No. 83

In the

# Supreme Court of the United States

HERRIN TRANSPORTATION COMPANY,
*Appellant,*

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., AND STRICKLAND TRANSPORTATAION CO., INC.,
*Appellees.*

*On Appeal From the United States District Court for the Southern District of Texas*

## JURISDICTIONAL STATEMENT

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March 14, 1961

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October Term, 1961

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HERRIN TRANSPORTATION COMPANY,

*Appellant,*

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., AND STRICKLAND TRANSPORTATAION CO., INC.,

*Appellees.*

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*On Appeal From the United States District Court for the Southern District of Texas*

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## JURISDICTIONAL STATEMENT

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Appellant appeals from the judgment of the United States District Court for the Southern District of Texas, entered on November 28, 1960, affirming in part and setting aside in part an order of the Interstate Commerce Commission, its appeal being from that portion of the judgment affirming in part the order of the Interstate Commerce Commission and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are present.

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 186 F. Supp. 777 and is set forth in Appendix A to this statement. Reproduced as Appendix B is the judgment entered on November 28, 1960. The report of the Interstate Commerce Commission is reported at 77 M.C.C. 655, and is set forth as Appendix C to this statement.

## JURISDICTION

This suit was brought under 28 U.S.C. §§1336, 1398, 2321, et seq., 5 U.S.C. 1001 et seq., to set aside an order of the Interstate Commerce Commission. The opinion of the District Court was filed August 1, 1960. The final judgment of the District Court was entered on November 28, 1960, and notice of appeal was filed in that Court on January 20, 1961.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b) and is sustained by the decision in *United States v. Pierce Auto Freight Lines*, 327 U.S. 515.

## STATUTES INVOLVED

Sections 17 (1), (2), (3) and 207 (a) [49 U.S.C. §§17 (1), (2), (3) and 307 (a)] of The Interstate Commerce Act; Sections 3, 5, 7, 8 (b) and 11 [5 U.S.C. §§1002, 1004, 1006, 1007 (b) and 1010] of the Administrative Procedure

Act and Interstate Commerce Commission organizational rules, §§2.3 4.1, 4.2(g), 23 F.R. 1747 are set forth in Appendix D hereto.

## QUESTIONS PRESENTED

(1) Where a Hearing Examiner's report recommending denial of applications under Section 207 (a) of the Interstate Commerce Act, 49 U.S.C. §307 (a) has been submitted to Division 1 of the Interstate Commerce Commission "for action thereon" in accordance with the Interstate Commerce Commission's organizational rules §§4.1 and 4.2 (g) promulgated and published at 23 F.R. 1747, pursuant to the general authority contained §17 (1) and (2) of the Interstate Commerce Act, [49 U.S.C.A. §17 (1) and (2)] and pursuant to the requirements of Section 3 (a) of the Administrative Procedure Act [5 U.S.C. §1002 (a)], and the Division thereafter "circulates" a report, but never serves same upon the parties, and instead votes to "certify the report" to the entire Interstate Commerce Commission for consideration and action, such vote to certify never having been the subject of a minute entry, but having been recorded in a memorandum prepared by the Clearance Clerk for Division 1, which was not publicly recorded or served on the parties, and the entire Interstate Commerce Commission thereafter does consider and act upon such proceedings and issues a report reversing the Examiner, granting both applications, no report ever having been issued by the Division, and no order of "recall" ever having been issued by the full Commission,

(a) is action of the full Commission invalid in that Division 1 never issued and served upon the parties a Report in the matters delegated to it and no order of recall of such proceedings by the entire Commission was ever issued as required by the Commission's organizational rules, § 2.3, 23 F.R. 1747, 1748?

(b) is the action of the entire Commission invalid in that neither the statute 49 U.S.C. §17 nor the Interstate Commerce Commission's organizational rules, 23 F.R. 1747, make any provision for or authorize such a certification of the entire case?

(c) assuming that the Division could certify the whole case, is the purported action to certify here ineffective and invalid in that no official action was taken in accordance with the statutory requirement 49 U.S.C. §17 (3) which provides that "Every vote and official act of the Commission, or any division * * * shall be entered or recorded, and such record shall be made public upon the request of any interest party?"

(d) the entire Commission having issued a report and order in the subject proceedings without the adoption of and service upon the parties of a report and order by Division 1, and without any order of recall having been entered by the Commission recalling the assignment of the applications to Division 1, is the action of the entire Commission invalid in that such procedure deprived complainants either of a favorable report of Division 1, or an opportunity, if the report were unfavorable, to file a Petition for Reconsideration by the entire Commission, to-

gether with additional briefs pointing out the errors of the Division report?

(2) Are the final report and orders of October 14, 1958, 77 M.C.C. 655, invalid because adopted by the Commission through voting by notation rather than at a conference at which the members were physically present and assembled together?

(3) Assuming notation voting when properly provided for may be selected by the Commission as a proper manner of dispatching its business, are the final report and orders of October 14, 1958, 77 M.C.C. 655, invalid in that no procedure of notation voting has ever been published by the Interstate Commerce Commission in the Federal Register?

(4) Is the order of the Commission of April 10, 1959, denying complainants' Petition for Reconsideration and Further Hearing "* * * for the reason that the findings of the Commission are in accordance with the evidence and the applicable law," invalid for the reason that such conclusion is not supported by basic or essential findings or reasons therefor, in accordance with §8 (b) of the Administrative Procedure Act, 5 U.S.C.A. §1007 (b)?

(5) Does the Administrative Procedure Act apply to the "intermediate review" stage of proceedings before the Interstate Commerce Commission so that review of evidence and making of recommendations can only be done by Hearing Examiners qualified under §11 of the Administrative Procedure Act, 5 U.S.C.A. §1010, and must those recommendations be served upon the parties with an opportunity to file exceptions to them?

## STATEMENT

Appellant, with another carrier not a party to this suit,[1] brought this action to set aside Certificates of Public Convenience and Necessity, issued under Section 207 (a) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 307 (a), authorizing 2 additional motor carriers (Southern-Plaza Express, Inc. and Strickland Transportation Co., Inc.) to operate between Houston and New Orleans. Appellant was a protestant before the Interstate Commerce Commission, it being an existing carrier between Houston and New Orleans. In 1954 Strickland Transportation Co. (Strickland) in No. MC-59680 (Sub No. 117) by an application filed June 21, 1954, applied for a Certificate of Public Convenience and Necessity authorizing it to operate as a motor common carrier of general commodities between Houston and New Orleans over 2 routes, 1 via Beaumont, Texas and Lafayette, Louisiana, called the "southern route," and the other via Beaumont, Texas and Baton Rouge, Louisiana, "northern route." In 1955 in No. MC-10928 (Sub No. 26), by an application filed September 26, 1955, Southern-Plaza Express sought a Certificate of Public Convenience and Necessity authorizing it to operate as a motor common carrier of general commodities between Houston and New Orleans over the southern route only.

After extensive hearings before a qualified Hearing Examiner the Examiner in a single report, served in October, 1957, recommended denial of both applications. Exceptions and replies to the Examiner's Report were filed

[1] T.S.C. Motor Freight Lines, Inc.

and the proceedings in the usual course were referred to Division 1 of the Commission "for action thereon", in accordance with the Commission's organizational rules, Sections 4.1 and 4.2, promulgated and published in 23 F.R. 1747. The Commission's organizational rules Section 2.3, 23 F.R. 1747, provides that a Division may "call upon the whole Commission for advise and counsel, or for consideration of any case or question by * * * additional commissioners * * *," and also provide that "the Commission may recall and bring before it as such any case, matter or question" pending before a Division. No official order of recall of these proceedings was ever entered by the Commission. Instead a memorandum dated July 23, 1958, was made by the Clearance Clerk of Division 1 whereby Division 1 purported to certify the entire proceedings to the Interstate Commerce Commission, such memorandum being as follows:

"July 23, 1958

"MEMORANDUM TO DIRECTOR COYLE

"Division 1, COMMRS. MURPHY, WALRATH & GOFF, has today voted to certify the report circulated June 3, 1958 to the entire Commission for consideration and decision; COMMR. WALRATH voting to return the report for revision to grant both applications."

There is no minute entry of the Division reflecting the action disclosed in the clerk's memorandum, and such memorandum was not publicly recorded or served on the parties. Thereafter, the entire Commission did consider and act upon the proceedings involved, its action being contained in the report attached hereto as Appendix C. The

action of the Commission in adopting the report, 77 M.C.C. 655, in which 2 Commissioners dissented and 3 Commissioners did not participate, was taken not as the result of a meeting of said Commissioners but as a result of voting by notation.

Petitions for reconsideration and replies thereto were filed by the parties after the report of the Commission, 77 M.C.C. 655 was served, and thereafter in April, 1959, the Commission denied the petition for reconsideration "* * * for the reason that the findings of the Commission are in accordance with the evidence and the applicable law."

After the service of the Hearing Examiner's Report and the filing of exceptions and replies thereto, the proceedings were reviewed by and recommendations made by certain attorney-advisor employees of the Commission who were not qualified under the Administrative Procedure Act, and no copy of the recommendations of such attorney-advisor employees were ever submitted to, made available to, nor served upon any parties of record, and no copy thereof appears in the records of the Commission made available to the public. No opportunity was afforded appellant or any other party of record to submit for consideration of the Commission, prior to its action upon the review and recommendations of such attorney-advisor employees of the Commission, (a) proposed findings and conclusions, (b) exceptions to the decisions or recommended decisions of such attorney-advisor employees, nor to the tentative decisions or drafts by such attorney-advisor employees,

and (c) supporting reasons for such exceptions or proposed findings or conclusions.

No procedure for notation voting has ever been published by the Interstate Commerce Commission in the Federal Register.

The Court held that the action of the Commission in all respects under the circumstances outlined was valid. That part of the orders complained of granting authority to the applicants before the Commission between Houston and Beaumont was set aside and the remainder of the orders of the Commission was affirmed, and the matter was referred to the Commission for further proceedings consistent with the action of the Court.

## THE QUESTIONS ARE SUBSTANTIAL

1. (a) (b) (c) It is undisputed that Division 1 never issued a report in this proceeding, and that no order of recall of such proceedings by the entire Commission was ever issued as required by the Commission's organizational rules, Section 2.3, 23 F.R. 1747. It is further undisputed that there is no provision in the statute nor in the Commission's organizational rules for a certification of an entire case as Division 1 purported to do in this proceeding. It is also undisputed that the purported certification of these proceedings by Division 1 was not recorded in any official order or in any minute entered of record and made public. The Court did not hold the action of the Commission invalid for any of these reasons.

The Commission's organizational rules hereinabove cited are published as required by Section 3 (a) of the Administrative Procedure Act. They describe the organization of and procedures of the Commission. They describe how a case assigned to a division may be brought back to the full Commission. That is by "recall." It is not by a purported certification by the division. Parties are entitled to know how matters to which they are parties are handled within the Commission, and that the administrative agency handles matters in accordance with published procedure. Must the Commission comply with its own rule specifying how a case may be recalled by it from a Division? We submit that it must.

Section 17 (3) of the Interstate Commerce Act requires that "* * * Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record and such record shall be made public on the request of any party." Here the purported action did not comply with this statutory requirement. Must the Commission take official actions in the manner required by statute, or may it disregard such requirement? We submit that it must act in accordance with statutory requirement.

These issues involved whether or not the Commission in performance of its administrative functions must comply with its own organizational rules and requirements and the clear requirement of statute. Appellant submits that these are matters of interest not only to this appellant, but also to others in like situations whose business is regu-

lated by the Interstate Commerce Commission, as well as countless other persons, firms, corporations, whose business and other activities are regulated or subject to regulation by other administrative agencies of the United States Government. These issues are matters of public importance.

(d) The Commission's organizational rules providing that matters arising under Section 207 (a) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 307 (a), shall be referred to Division 1, and further providing that the Division may recall and bring before it, as such, any case assigned to such Division, where the Commission, as here, fails to issue such an order of recall, in an official action, and on the contrary a Division purports to certify the case to the full Commission without any record of official action thereon, and through the medium of a "memorandum" from the Clearance Clerk, such action deprived appellant, wrongfully, of an opportunity to specify such errors as there may have been in the findings or conclusions contained in the "report circulated June 3, 1958," or, if such report were favorable to appellant, it deprived appellant of such favorable report.

It cannot be said that appellant has not been prejudiced by the action of the Commission in the circumstances here involved. No one knows what the division report would have been—or what the action of the full Commission may have been upon receiving petitions for reconsideration of the Division Report. Both applications may have been denied finally. Since the Commission did not comply with its own

organizational rules and the plain requirement of statute in the handling of these proceedings, appellant has been denied due process. Indeed, in *Riss & Co., Inc. v. United States, et al. (U.S.D. Ct. W.C. Mo., 1950), 96 F. Supp. 452, rev. (U. S. Sup. Ct. April 16, 1951), 341 U. S. 907, 95 L. Ed. 1345, 71 S. Ct. 620*, the plaintiff, Riss & Co. had had its case decided by the full Commission, but this Court held that failure to comply with statutory requirements of the Administrative Procedure Act invalidated the action of the Commission.

Again, this is a matter affecting not only appellant, but others similarly situated in respect to the Interstate Commerce Commission as well as other administrative agencies of the government. Whether the Commission can, without complying with and contrary to procedure set up pursuant to statutory authority in its own organizational rules, deprive appellant of one step in the administrative process, is a matter of substantial importance, and should be determined with finality.

2. It is undisputed that the final report and order of October 14, 1958, 77 M.C.C. 655, were adopted by individual action of the Commissioners through notation voting rather than at a conference at which the members were physically present and assembled together.

Sec. 17 (3) of the Interstate Commerce Act, 49 U.S.C.A. 17(3), provides that:

> "A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business."

Such language clearly indicates the duty of the Commission to act in meeting in order to give validity to its orders. If a meeting called for by the physical presence of the Commissioners was not intended by such language, no useful purpose would have been served by Congress in the use of the term "quorum."

While there appears to be no controlling federal decisional authority on the point, the state courts are virtually unanimous in condemning action of this kind. At *73 C.J.S. Public Utilities, Sec. 58 (1951)*, the rule is stated as follows:

> "A public utility commission must act as a body and not as an aggregate of individuals, and, while under some statutes individual commissioners may hold hearings * * * the final order must be that of the Commission as a whole, acting at a stated meeting or one properly called and of which all the commissioners had notice or which they were given an opportunity to attend; and an order made by one commissioner, although with the consent of the other commissioners, is not a valid order of the Commission."

Accord, *49 Am. Jur. Public Administrative Law §74 (1942)*. This rule is suported by the decisions of many states. *Schwanbeck v. People, 15 Colo. 64, 24 P. 575 (1890)*; (state board could not approve construction work by individual action of the members acting separately); *Paola & Fall River Ry. v. Anderson County Comm'rs., 16 Kan. 302 (1876)*; (board of county commissioners could cancel stock subscriptions made by two members not at regular or called session); *Thompson v. West, 59 Neb. 677, 82 N.W. 13 (1900)* (church not liable on note made in its behalf by

individual action of trustees); *State v. Kelly, 27 N. M. 412, 202 P. 524 (1921)* (state loan board held meeting which would support conviction for presenting false claim to board); *People v. Whitridge, 144 App. Div. 486, 124 N. Y. S. 295, aff. mem., 204 N. Y. 646, 97 N. E. 122 (1911)* (order of Public Service Commission consented to by commissioners separately would not support penal action for violation of order); *State v. Union Light Heat & Power Co., 47 N. D. 402, 182, N. W. 539 (1921)* (state board of Railroad Commissioners can fix utility rates only when assembled for purpose of taking action); *Pattawotomie County v. Shelton, 26 Okla. 229, 109 P. 67 (1910)* (school board not liable on contract made by members individually, not assembled together as a board); *Murphy v. City of Albina, 22 Ore. 106, 29 P. 353 (1892)* (city not liable on contract ratified by council men individually but not when meeting as the council); *Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62, 31 A. 468 (1895)* (city cannot grant right of way by separate action of the individuals who compose the board); *Webster v. Texas & Pacific Motor Transport Co., 140 Tex. 131, 166 S. W. 2d 75 (1942)* (state Railroad Commission cannot grant authority to carrier through individual action of commissioners not assembled as the Commission); *Honaker v. Board of Education, 42 W. Va. 170, 24 S. E. 544 (1896)* (school board enjoined from performing contract made by members acting separately and not as board); *McNolty v. Board of School Directors, 102 Wis. 261, 78 N. W. 439 (1899)* (school board not liable for breach of contract made by members acting separately).

Here the Congress has committed the decision of important matters to the "Commission," and not to individual Commissioners. This being so, Congress had evidenced an intention that such matters should be decided by that body acting as such. This was the holding of the Supreme Court of Texas in reference to the Railroad Commission of Texas, in *Webster v. Tex. and Pac. Motor Transport Co., 140 Tex. 131, 166 S. W. 2d 75, 78 (1942)*. Additionally it is the right that all parties should have the benefit of the counsel and judgment of all persons to whom the Congress has entrusted the decision of such matters as are here involved. This was the view expressed by the Supreme Court of Kansas in *Panola & Fall River Ry. v. Anderson County Comm'rs., 16 Kan. 302, 309 (1876)*.

While Section 17 (3) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 17 (3), provides that "the Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business to the ends of justice * * *," that provision, we submit, does not negative the necessity for its acting as a Commission in a duly constituted meeting for the disposition of such matters as is here involved. Nor can the Commission's work load excuse it from acting as a Commission.

The holding of the court complained of further removes the Interstate Commerce Commission as a Commission from matters coming before it and we submit, cannot help but weaken the administrative process, the strengthening of which was the very purpose of the Administrative Procedure Act.

This issue and question likewise is one of importance involving not only this litigant, but many others similarly situated before the Interstate Commerce Commission as well as other administrative bureaus of the government. It should be resolved by this Court we submit after briefs and oral hearing.

3. Even assuming that notation voting when properly provided for may be selected by the Commission as a proper means of dispatching its business, no procedure of notation voting has ever been published by the Commission in the Federal Register. It is the contention of appellant that under the provisions of Section 3 (a) Administrative Procedure Act. 5 U.S.C.A. Sec. 1002 (a), that even if such procedure may be used by the Commission, it must be provided for by a publication in the Federal Register which has not been done in the case of the Commission. While the Court held that the matter of notation voting was one relating solely to the internal management of the Commission, and was therefore exempt from publication in the Federal Register under the provisions of Section 3 of the Administrative Procedure Act (5 U.S.C.A. Sec. 1002), the procedure of notation voting is, we submit, within the provisions of Section 3 (a) (2) of the Administrative Procedure Act, 5 U.S.C.A. Sec. 1002 (a) (2) and is a part of the general course and method by which the Commission functions are channeled and determined, and must be published in accordance with that Act.

4. There is squarely raised in this proceeding the issue of whether or not the "intermediate review" stage of proceedings before the Interstate Commerce Commission is sub-

ject to the Administrative Procedure Act so that (1) review of evidence and making of recommendations can only be done by Hearing Examiners qualified under Section 11 of the Administrative Procedure Act, (2) with an opportunity to the parties to file exceptions to such recommendations. It is undisputed that attorney-advisors, not qualified under the provisions of the Interstate Commerce Act as Hearing Examiners, did in these proceedings, and do in Commission proceedings in general, take the Hearing Examiner's Report, Exceptions and Replies, and prepare a draft of a final report. This report is the recommendation by the advisor who is expected to arrive at his recommendation through his independent study of the record. The report is then turned over to another reviewer who, unfamiliar with the same, goes over the draft of the initial staff reviewer. The re-reviewer may make changes, but if he disagrees with the draft of the initial reviewer then the draft of the initial reviewer must go to the Commission along with the comments of the re-reviewer. The final step is by the Review Committee composed of 3 men of the greatest experience on the staff who take a "quick look" at the report before it goes to the Division or Commission. The draft and recommendation is then sent to the Commission. Contrary to the holding of the Court, we submit that such intermediate review within the Interstate Commerce Commission comes squarely within the provisions of Section 8 (b) Administrative Procedure Act, 5 U.S.C.A. 1007 (b), and that the orders of the Commission here complained of are invalid in that appellant was given no opportunity to sub-

mit for consideration of the reviewing attorney-advisors (1) proposed findings and conclusions, (2) exceptions to the drafts or recommended decisions of such subordinate officers or to their tentative Commission decision, or (3) supporting reasons for such exceptions or proposed findings or conclusions. Nor was the review by persons qualified as Hearing Examiners as hereinabove pointed out. The Court was in error, we submit, in finding that the intermediate review stage is not subject to the Administrative Procedure Act, and that the reviewers are not required under the terms of the Administrative Procedure Act to be qualified Hearing Examiners. Certainly the great volume of business handled within the Interstate Commerce Commission cannot justify its failure to conduct its business in accordance with the provisions of the Administrative Procedure Act. We know of no case disposing of this issue. A consideration of the legislative history, of Section 8 (b) of the Administrative Procedure Act demonstrates that it was the Congressional intent to either avoid the intermediate review, or at least to apply the standards of proper statutory guides to such an intermediate review.

*Legislative History, Administrative Procedure Act (79th Congress, 1944-46), Senate Document No. 248*, contains the "Report of Senate Judiciary Committee" and its comment at page 210 relative to Section 8. (b) as follows:

> "Ordinarily proposed findings and conclusions are submitted only to the officers making the initial decision, and the parties present exceptions thereafter if they contest the result. However, such exceptions may in form or effect include proposed findings or conclu-

sions for the reviewing authority to consider as a part of the exceptions. 'Supporting reasons' means that briefs on the law and facts must be received and fully considered by *every* recommending, deciding, or reviewing officer. They must also hear such oral argument as may be required by law. When the issues of fact are serious and the case becomes one adversary in character, the agency should provide for oral argument before all recommending, deciding, or reviewing officers at least as a matter of good practice." (Emphasis supplied.)

There is contained in the same report the Appendix to the Attorney General Tom C. Clark's "Statement Regarding Revised Committee Print of October 5, 1955", and at page 229 it is stated:

"Section 8 (b): Prior to each recommended, initial or tentative decision, parties shall have a timely opportunity to submit proposed findings and conclusions, and, prior to each decision upon agency review of either the decision of subordinate officers or of the agency's tentative decisions, to submit exceptions to the initial, recommended, or tentative decision, as the case may be. Subject to the agency's rules, either the proposed findings or the exceptions may be oral in the form where such mode of presentation is adequate."

Here, not only were the safeguards and opportunities required to be afforded to the parties by Section 8 (b) of the Administrative Procedure Act ignored, but also, the processing, opinion writing, review, and recommendations were accomplished by staff members of the Commission who were not qualified under Section 11 of the Administrative Procedure Act (5 U.S.C., § 1010) which, in its pertinent portions, provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be ap-

pointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to Sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners."

It is clear, therefore, that the review of cases by subordinate employees, under Section 8 of the Administrative Procedure Act, is required to be performed by those examiners qualified under Section 11 of the Administrative Procedure Act, just as the hearing of cases under Section 7 of the Administrative Procedure Act, was declared to be required by examiners qualified under Section 11 of the Administrative Procedure Act in *Riss & Co., Inc, v. United States, et al., 341 U. S. 907, 95 L. Ed. 1345, 71 S. Ct. 620, reversing 96 Fed. Supp. 452,* in reliance upon *Wong Yang Sung v. McGrath, et al. (U. S. Sup. Ct. 1950), 339 U. S. 33, 94 L. Ed. 616, 70 St. Ct. 445.* The failure of the Commission to provide such statutory safeguards invalidates the orders of October 14, 1958, and April 10, 1959.

In the "First Report to the Interstate Commerce Commission" dated October 1, 1960, by the "Special Advisory Committee on Interstate Commerce Commission Practices and Procedures," (a committee of 18 individuals having experience in practice before, and in some instances, prior membership on the staffs of the Commission and State regulatory agencies, which committee was created by the Commission in November 1959, through appointment of its mem-

bership by the Chairman), concerning the issues here raised that committee reported as follows:

"II. BASIC INADEQUACIES AND INEFFICIENCIES

"Administrative agencies generally, and the Interstate Commerce Commission in particular, are being criticized primarily for delay in the rendition of final decisions in adjudicatory matters. We regard as far more important than delays in the process the inadequacies which have been allowed to develop in the decisional process itself—apparently in an effort to cope with the workload. Rather than to prescribe speed-up procedures at the possible cost of a further weakening of the decisional process, we believe it to be imperative to define what is required for an adequate decisional process and to make recommendations as to the organization and procedures necessary to accomplish that objective as our primary mission, believing that when this is achieved expedition should follow.

"*A. Inadequacies In The Decisional Process*

"We find that the principal inadequacies in the execution of its functions by the Commission in the field of adjudication are:

"1. *Absence of Complete Responsibility For Reports At Commission Level:* Commission reports, issued either as those of a Division or of the entire Commission, are what have come to be generally known as 'institutional decisions'. That is, they reflect the work, the analysis and the reasoning of various anonymous members of the Commission's staff, with the function of the individual members of the Commission being limited in large measure (except primarily in cases of major importance) to a review of the work of their staff. In contrast, in years gone by under a lighter workload, it was the practice of many Commissioners to take individual responsibility for the preparation of reports, including, in a number of instances (chiefly in cases of major importance), the actual writing of the report itself.

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In 1929 in 168 cases, 15% of all adversary cases.

"The principal defects of the present decisional process are: (1) the use of inexperienced personnel in the preparation of final reports, (2) preparation of final reports as a staff function at the Bureau level rather than under the direct and immediate supervision of the deciding and responsible Commissioner, (3) the complete anonymity of institutional reports indicative of a lack of responsibility and which may lead to a loss of public confidence, (4) insufficient time for personal participation by deciding Commissioners which may well lead to lack of a completely informed judgment in the making of the ultimate decision and (5) the general use of notation voting rather than the use of Division and entire Commission conferences as an aid to reaching and securing informed decisions.

"The Committee has considered a number of proposals to deal with this difficult problem as well as suggested changes in organization and internal procedure of many kinds. The essential result sought to be obtained by each was the accomplishment of a responsible decisional process at the Commission level, to be evidenced by one Commissioner assuming full responsibilities for the *preparation* and contents of each final report and certifying to that fact by appending his name to the report. Obviously, much of that which is sought to be accomplished cannot be accomplished through mere changes in organization and procedures. Each Commissioner determines for himself the extent which he discharges his personal responsibility with respect to the decision of any case. The Committee wishes to emphasize, however, that whether or not its particular recommendations for the improvement in decisional processes are adopted in whole or in part, this area is the one in which, in its opinion, there is the best opportunity for increasing public confidence in the work of the Commission.

"Other inadequacies in the decisional process, which are discussed below, result from the extent to which

institutional report writing has led to greater and greater delegations of the Commission's *adjudicatory* functions.

"2. *Inadequate Statements of Reasons or Basis.* Reports written by attorney-advisors for submission to the Division often appear to be written so that the decision can be rendered for either party by making a change in only the final paragraphs of the report which deal with the ultimate conclusion. Often facts are recited as contentions of the parties rather than as findings of fact. Citations of authority and conclusions of law are of general rather than specific nature. Often there is a clear hiatus in reasoning or an absence of a casual connection between the statement of facts and the ultimate conclusion. A report writer who prepares a report without knowing what the decision will be, without consultation with the deciding Commissioners, and under administrative scrutiny as to the number of reports which he produces, will tend to adopt a method least likely to result in the necessity for changes or rewriting. The reports thus produced are unlikely to stimulate critical review by the attorney-advisors in the offices of the Commissioners or by the Commissioners themselves. The lack of inherent indicia of adequate consideration and conviction often shown in such reports stimulates petitions for reconsideration and frequently renders the reports difficult, if not impossible, to defend on judicial review.

"3. *Lack of Consistency.* It is sometimes impossible to reconcile Commission decisions in identical cases. Often the same amount of authority can be marshalled on either side of any issue. While consistency is not an absolute requirement of administrative decision, the more it can be accomplished the greater will be the value of the Commission's work to those regulated by it and the less work it will have to do. Inconsistency in decisions not only delays the disposition of pending proceedings but stimulates new proceedings. The remedy lies with the Commission itself. While it may be a

convenience to a report writer, a practice which permits him to marshal authority in favor of a decision either way leads to a lack of confidence in the decision and hence to unnecessary litigation. Finally the resulting inconsistency may lead to discrimination and injustice."

As is the case in connection with other procedural errors hereinabove discussed, it is thus seen that this issue is one of importance not only to the litigants herein, but to others similarly situated not only before the Interstate Commerce Commission but before other administrative bureaus of the government. We submit it is of such public importance as to require disposition by this Court.

## CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration with brief and oral argument, for their resolution.

Respectfully submitted,

PHINNEY, HALLMAN AND PULLEY,
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By Carl L. Phinney
CARL L. PHINNEY
*Attorneys for Appellant Herrin Transportation Company.*

March 14, 1961

## CERTIFICATE OF SERVICE

I, Carl L. Phinney, Attorney, for the Appellant Herrin Transportation Co. herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing Statement of Jurisdiction on the several parties to this action, as follows:

1. On plaintiff, T.S.C. Motor Freight Lines, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Reagan Sayers, Century Life Building, Fort Worth, Texas, and Mr. Jack Binion, Butler, Binion, Rice and Cook, Gulf Building, Houston, Texas.

2. On Intervening Plaintiffs, Central Freight Lines, Inc. and East Texas Motor Freight Lines, Inc., by mailing copies, in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, to-wit: Mr. Phillip Robinson, Smith, Robinson and Starnes, 401 Perry Brooks Building, Austin, Texas, and Mr. A. J. Watkins, Baker, Botts, Andrews and Shepherd, 1600 Esperson Building, Houston, Texas.

3. On defendant United States, by mailing copies in duly addressed envelopes, with air mail postage prepaid to its attorneys of record, to-wit: Mr. Roger A. Clark, Department of Justice, Washington 25, D. C., Mr. Robert A. Bicks, Acting Assistant Attorney General, Washington 25, D. C., and Mr. William D. Butler, United States Attorney, Southern District of Texas, 218 Main Post Office Building, Houston, Texas.

4. On defendant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with air mail

postage prepaid to its attorneys of record, to-wit: Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

5. On defendant Strickland Transportation Company by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Ewell H. Muse, Jr., 415 Perry Brooks Building, Austin, Texas, and Mr. W. N. Arnold, Jr., Fulbright, Crooker, Freeman, Bates and Jaworski, Bank of the Southwest Building, Houston 2, Texas.

6. On defendant Southern-Plaza Express, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Clarence D. Todd, Todd, Dillon and Singer, 1825 Jefferson Place, N.W., Washington 6, D. C., Mr. Dwight H. Austin, Liddell, Austin, Dawson and Huggins, Gulf Building, Houston 2, Texas, and Mr. Charles F. Riddle, Todd, Dillon and Singer, 1825 Jefferson Place, N.W., Washington 6, D. C.

DATED THIS THE 14th day of March, 1961.

Carl L. Phinney

CARL L. PHINNEY,
PHINNEY, HALLMAN AND PULLEY,
617 First National Bank Bldg.,
Dallas, Texas,
RI 8-3341,
*Attorneys for Herrin Transportation Co., Appellent.*

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 12,620

T.S.C. MOTOR FREIGHT LINES, INC., and
HERRIN TRANSPORTATION CO., INC.,
*Plaintiffs,*

and

CENTRAL FREIGHT LINES, INC., and
EAST TEXAS MOTOR FREIGHT LINES, INC.,
*Intervening Plaintiffs,*

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., and STRICKLAND TRANSPORTATION CO., INC.,
*Defendants.*

Before BROWN, Circuit Judge, CONNALLY and INGRAHAM, District Judges. BROWN, Circuit Judge:

This is an action by four motor carriers (TSC, Morris, Central and East Texas)[1] to set aside certificates of

[1]Original plaintiffs, protestants before the Commission, both of which operate between Houston and New Orleans over the routes involved serving the points sought by the applicants, are:

T.S.C. Motor Freight Lines, Inc. (TSC) and
Herrin Transportation Co., Inc. (Herrin).

The Intervening plaintiffs are:
Central Freight Lines, Inc. (Central) and
East Texas Motor Freight Lines, Inc. (East Texas).

Central operates between Orange, Texas and Houston over the route sought while East Texas, with somewhat limited authority, operates between Beaumont and Houston but not over the identical route here involved.

public convenience and necessity, issued under §207(a) of the ICC Act, 49 USCA §307(a), authorizing two additional motor carriers (Southern-Plaza and Strickland)[2] to operate between Houston and New Orleans.[3] We uphold the awards, but with some modification, against a succession of attacks.

In 1954 Strickland applied for a certificate of public convenience and necessity for motor carriage of general commodities between Houston and New Orleans,[4] and in 1955 Southern-Plaza applied for a similar authority.[5] This followed on the heels of a recent major but unsuccessful attempt of these carriers to secure authority to operate between Houston and New Orleans.[6] Strickland's application sought Houston-New Orleans authority over two routes, the one via Beaumont, Texas, and Lafayette, Louisiana, called the "southern" route, and the other via Beaumont and Baton Rouge, Louisiana, called the "northern" route. The Southern-Plaza application sought authority over the northern route only.

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[2]Defendant (applicant) carriers are:
Southern-Plaza Express, Inc. (Southern-Plaza) and
Strickland Transportation Co., Inc. (Strickland).

[3]The complaint filed by the interested motor carriers is for review by statutory three-judge court. 28 USCA §§1336, 1398, 2284, 2321-2325; Administrative Procedure Act, 5 USCA §1001 et seq.

[4]Strickland Trans. Co., Extension, La. routes, No. MC-59680 (Sub. No. 117), filed June 21, 1954.

[5]Southern-Plaza Express, Extension, La. routes, No. MC-10928 (Sub. No. 28), filed September 26, 1955.

[6]Both Strickland and Southern-Plaza (then Southern Express, Inc.) had previously (by application filed in 1947) attemped to establish a need for additional motor transportation facilities between Houston an New Orleans. After extensive hearings, former Division 5 of the ICC found in favor of the applicants. But on reconsideration, Southern Exp., Inc., Common Carrier Application, 62 MCC 35 (1953), the full Commission reversed the Division 5 findings and denied the applications.

Both of the applicants, Strickland and Southern-Plaza, are large trucking concerns with operations extending into several states. Both serve a number of major cities in Texas, such as, Dallas, Fort Worth, San Antonio, and Houston and operate between those points (among others) and such centers as St. Louis and Chicago. Strickland now holds authority to operate from Houston to Beaumont, over the route involved here, but not in the reverse direction.

After extensive hearings before Hearing Examiner Ross, the Examiner in a single report served in October 1957 recommended orders *denying* both applications. Exceptions and replies to the Examiner's report were filed, and the proceedings in the usual course were referred to Division 1 of the Commission "for action thereon." Thereafter, without any public report by Division 1 the matter was referred to the entire Commission. By a final report[7] issued October 14, 1958, the full Commission, while substantially adopting the Examiner's detailed statement of the facts, rejected the Examiner's recommendation and granted both applications. Strickland was awarded the so-called "northern" route[8] between Houston and New Orleans and Southern-Plaza, the "southern" route.[9]

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[7] ICC Report, 77 MCC 655, devided October 14, 1958. Two Commissioners dissented and three Commissioners did not participate.

[8] "We find in No. MC-59680 (Sub. No. 117) that the present and future public convenience and necessity require operation by applicant (Strickland), in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities * * * between Houston, Tex., and New Orleans (via specified highways) * * * to Baton Rouge, La., thence * * * to New Orleans; and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the Louisiana-Texas State line * * *." ICC Report, note 7, supra, 77 MCC 655, 669.

(Footnote 9 on Next Page)

Petitions for reconsideration and further hearing filed by the protesting carriers were denied in April 1959 "for the reason that the findings of the Commission are in accordance with the evidence and the applicable law." The Commission made no other basic findings or conclusions in connection with its order denying reconsideration.

The plaintiffs then filed this proceeding attacking the merits of the grants to Strickland and Southern-Plaza and also much of the procedure of the Commission in its handling of these applications. Specifically, the plaintiffs here complain of the procedure by which the Commission (1) issued its report without first having had Division 1 issue a report on the applications, (2) issued its report as the result of "constructive" sessions at which the members were not physically present, (3) allegedly had certain of its Attorney-Advisors, who were not Hearing Examiners, review the proceedings and make recommendations to the Commissioner, and (4) failed to make any additional findings on the petition for reconsideration and further hearing.

I.

*Procedure in Handling the Applications*

*A. Action by Division 1*

After the Hearing Examiner issued his report recommending *denial* of both applications, the matters (includ-

(Footnote 9 From Preceding Page)

[9] "We find in No. MC-10928 (Sub. No. 26), that the present and future public convenience and necessity require operation by applicant (Southern-Plaza), in intertate or foreign commerce, as a common carrier by motor vehicle of general commodities * * * between Houston and New Orleans, over U. S. Highway 90, through Lafayette, La., serving all intermediate points between Lafayette and New Orleans restricted to traffic moving to or from points west of the Louisiana-Texas State line * * *." ICC Report, note 7, supra, 77 MC 655, 669.

ing exceptions to the report and replies) were submitted to Division 1 of the Commission "for action thereon." This is the normal procedure under the Commission's organizational rules [10] which delegate §205 proceedings to Division 1. Normally the division renders a decision and issues a dispositive report and order subject to the right of the parties to petition for reconsideration by the entire Commission."

Departing from the usual course here, however, Division 1 did not make an official formal report. The proceedings were rather submitted directly to the entire Commission. Plaintiffs contend that the matters were not properly before the full Commission and that the Commission violated its organizational rules.

The Commission's organizational rules allow a division to "call upon the whole Commission for advice and counsel, or for consideration of any case or question by * * * additional Commissioners * * *." By the same token, "the Commission may recall and bring before it as such any case, matter or question" pending before any division.[12]

[10] The Commission's organizational procedure and delegation of duties are basically governed by §17 of the ICC Act. 49 USCA §17. Section 17(1) provides that "The Commission is authorized by its order to divide the members thereof into as many divisions * * * as it deems necessary, which may be changed from time to time. * * *." Section 17(2) provides that "the Commission may by order direct that any of its work, business, or functions * * * be assigned or referred to any division * * *." Pursuant to this general authority, the Commission promulgated and published its Organization of Divisions and Assignment of Work of the Interstate Commerce Commission, 23 F. R. 1747.

[11] ICC Organizational Rules, note 10, supra, §§4.1, 4.2(g).

[12] ICC Organization Rules, note 10, supra, §2.3, 23 F. R. 1747, 1748. "Each division with regard to any case or matter assigned to it * * * may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Commissioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter or question itself or refer the matter to the same or another division."

The Commission never did enter an official order of recall. It seems to be generally assumed that the impetus for Commission action came from Division 1 who purported to certify the whole case to the full Commission.[13]

Plaintiffs have several objections to the purported certification by Division 1. First they claim that there is no authority for such a certification of the entire case. That can only be accomplished by an order of recall by the entire Commission. Second, even assuming that the Division could certify the whole case, the effort was ineffective here since the decision to certify was not properly recorded. Giving substance to their objections, plaintiffs argue that they had proceeded on the basis of Division action. Thus, briefs and other matters were prepared with Division 1, not the entire Commission, in mind. Had they known that it was to be the full Commission who would decide the case, the approach may have been quite different. Also, they contend that due to the abdiction of Division 1, the protestants were deprived of a favorable[14] report by the Division or an

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[13] A memorandum dated July 23, 1953, made by the clearance clerk for Division 1, reports the decision of Division 1 to certify the proceedings to the entire Commission.

"July 23, 1958

"MEMORANDUM TO DIRECTOR COYLE

'Division 1, COMMRS. MURPHY, WALRATH & GOFF, has today voted to certify the report circulated June 3, 1958 to the entire Commission for consideration and decision; COMMR. WALRATH voting to return the report for revision to grant both applications."

The "report circulated June 3, 1958" referred to in the memorandum indicates that Division 1 apparently had drafted a report.

[14] The "report circulated June 3, 1958," may have recommended denial of the applications. The clerk's memorandum, note 13, supra, recites that Commissioner Walrath voted "to return the report for *revision* to grant *both* applications." (Emphasis supplied.) Therefore, the tentative report may have been either a denial of both applications or a grant of one application and denial of the other.

opportunity, if the report were unfavorable,[13] to file a petition for reconsideration by the entire Commission, together with additional briefs pointing out the errors of the Division report.

The certification of the cases to the Commission by Division 1 complies in all substantial respects with the Commission's organizational rules. This is so whether viewed as either a request by Division 1 for "advice and counsel" or as the assignment of additional Commissioners to consider the case. In either event, when the Commission accepted the certification and undertook to receive the issues presented, its action in effect amounted to a recall of that matter from the Division. The rule—whose purpose was to announce the orderly internal procedure of the Commission—provided its own exception; namely, consideration by the the entire Commission came from the Division or the Com- Whether the initiating force for such a consideration by teh entire Commission came from the Division or the Commission seems unimportant.

The vote to request consideration by the entire Commission was recorded in a memorandum prepared by the clearance clerk for Division 1, note 13, supra. There is no minute entry reflecting the action and the clerk's memorandum was not publicly recorded or served on the parties. Plaintiffs argue the action was a nullity in violation of §17(3)

[13] Applicants have some ground for thinking that the report may have recommended granting at least one of the applications. The clearance clerk's memorandum, note 13, supra, indicates that Commissioner Walrath favored granting both applications. Commissioner Goff finally dissented from the Commission's granting of both applications. Commissioner Murphy (who replaced Commissioner Hutchinson) eventually voted with the entire Commission to grant both applications. But apparently Commissioner Murphy and Commissioner Goff felt that the cases should go before the whole Commission.

of the ICC Act which provides that "[E]very vote and official act of the Commission, or any division * * * shall be entered of record, and such record shall be made public upon the request of any interested party." The purpose of this provision is to insure that parties have an opportunity to know of any action which may affect their rights. It is especially necessary in cases in which an order of the division may become final within 20 days if no exceptions are filed by the parties.[16]

It is difficult to see how the plaintiffs could have been prejudiced by the failure to record the action of Division 1 since it resulted in a consideration by the entire Commission of the proceedings. What the whole Commission has relegated, it obviously could recall and consider as a body.[17] Moreover, the Protestants could not have challenged the right of the Commission to take the whole case. They lost no right to complain nor to complain by a certain time. In the absence of prejudice, the action of the Commission must stand. See §10(c), 3 USCA §1009(e); ABC Freight Forwarding Corp. v. United States, S.D.N.Y., 1959, 169 F. Supp. 403, 406, citing Market Street Railway v. Commission, 1945, 324 U. S. 548, 561-562, 65 S. Ct. 770, 89 L. Ed. 1171,

Secondly, it is difficult to see how the plaintiffs could have been injured by the failure of Division 1 to issue a report. The referral to Division 1, in the first instance, was merely a permissive delegation of the Commission's responsibility to determine the case. The contention that if the circulated but undisclosed report was unfavorable,

[16]See, e.g., 49 USCA §17(5).
[17]See note 10, supra.

the protestants were deprived of an opportunity to file a petition for reconsideration by the entire Commission overlooks the fact that this is exactly what occurred—the matter was considered by the entire Commission. Plaintiffs still had the right to petition for reconsideration after the report of the entire Commission. And this, of course, they did. The argument that the briefs may have been written differently if the plaintiffs had known that the persons deciding the case were other than those expected needs little comment. The Commission is, of course, an institutional agency and the appeal must be to the institution, not to the personal predilection of the individual members. The make-up of the divisions, as the make-up of the Commission, may change. In any event, new arguments or appeals could be made in amended or supplemental briefs.

*B. "Constructive" Sessions—Notation Voting*

Plaintiffs argue that the final report and orders of October 14, 1958, note 7, supra, were invalid because adopted by the Commission through voting by notation[18]

[18]The vote-by-notation procedure is set up in the minutes of the Commission of October 2, 1953:

"3. CONSTRUCTIVE SESSIONS: ACTION BY NOTATION.

"(A) At other than regular or special conferences official action may be taken by the Commission * * * (or) any division * * * in constructive session through voting by notation. For this purpose (1) a copy of the report, order, or other document under consideration may be used as a manuscript on which each Commissioner * * * will indicate his vote, or (2) each Commissioner * * * may cast his vote by separate memorandum. In each instance, the participating Commissioners * * * may informally confer * * * or exchange their views in writing. * * * (T)he date of decision shall be the date upon which the last individual vote is cast. If, before the votes of all others participating in the voting have been cast, any Commissioner * * * shall request, in writing, conference consideration, or if in the judgment of the Commissioner * * * through whose office the votes are to be cleared undue delay in the voting occurs the subject-matter will be transferred to an appropriate conference agenda.

"(B) The vote by memorandum of each Commissioner * * * shall be sent to the Commissioner * * * through whose office the matter is to be cleared. Copies of such vote need not be circulated to the other Commissioners * * * unless it explains the reason for the vote. A copy of the clearance memorandum * * * shall be sent to each Commissioner * * *."

rather than at a conference at which the Commission members were physically present and assembled together. Plaintiffs attack this procedure as calling for action of individual members of the Commission rather than the official action of the Commission as a body. Moreover, such a procedure is invalid because not published in the Federal Register.

Although there is little federal authority,[19] the state courts universally require that official action of state commissioners,[20] town counsels,[21] county boards,[22] school boards,[23] church trustees,[24] and corporation boards of di-

[19]The Federal Communications' Commission justified its notation voting procedure in the disposition of *interlocutory* matters: "Throughout the existence of the Commission, it has been the consistent practice with respect to interlocutory matters requiring disposition before the next scheduled meeting of the Commission, to take action by circulation. This practice has been followed in view of the provisions of section 4(j) of the Communications Act of 1934, as amended, which provides that 'the Commission may conduct its proceeding in such manner as will best conduce to the proper dispatch of business and the ends of justice.' * * *." In re Applications of Jackson Broadcasting Co., 13 Fed. Comm. 72, 3a Ad. L. (Pike and Fischer) 48C.15-1 (F.C.C. 1948).

Congress has had notice from time to time of the notation voting procedure of various agencies. Notation voting within the divisions of the Interstate Commerce Commission is described in the monograph of the Attorney General's Committee on Administrative Procedure, Part 11, page 36 (1941), Sen. Doc. No. 10, 77th Cong. 1st Sess. See also *The Report on Practices and Procedures of Governmental Control* by the Board of Investigation and Research, House Doc. No. 678, 78th Cong. 2nd Sess. 1944, page 194. Potter v. United States, 1883, 107 U. S. 126, 1 S. Ct. 524, 27 L. Ed. 330; Smith v. United States, 1898, 170 U. S. 372, 18 S. Ct. 626, 42 L. Ed. 1074; Lytle v. Arkansas, 1850, 50 U. S. 314, 13 L. Ed. 153.

[20]E.g., Webster v. Texas & Pacific Motor Transport Co., 1942, 140 Tex. 131, 166 S.W.2d 75; (Texas Railroad Commission); State v. Union Light, Heat & Power Co., 1921, 47 N. D. 492, 182 N.W. 539 (State Railroad Commission); Schwaabeck v. People, 1890, 15 Colo. 64, 24 P. 575 (State Board); 42 AM. JUR. *Public Administrative Law* §74 (1942). But see, Southern Calif. Jockey Club v. California Horse Racing Board, 1950, 36 Cal.2d 167, 223 P.2d 1; Erkman v. Civil Service Comm. of Provo City, 1948, 114 Utah 228, 198 P.2d 238.

[21]Murphy v. City of Albian, 1892, 22 Ore. 106, 29 P. 353; Pennsylvania R. v. Montgomery County Pass. Ry. Co., 1895, 165 Pa. 62, 31 A. 468; City of Floydada v. Gilliam, Tex.Civ.App., 1937, 111 S.W.2d 761; King v. Guerra, Tex. Civ. App., 1927, 1 S.W.2d 373.

[22]Paola & Fall River Ry. Co. v. Commissioners of Anderson County, 1876, 16 Kan. 302.

[23]Pattawatomie County v. Shelton, 1910, 26 Okla. 229, 109 P. 67; Honaker v. Board of Eduction, 1896, 42 W. Va. 170, 24 S.E. 544; McNolty v. Board of School Directors, 1899, 102 Wisc 261, 78 N.W. 439; but see, School District No. 25 v. Stone, Colo. App., 1900, 59 P. 885, 887.

[24]Thompson v. West, 1909, 59 Neb. 677, 82 N.W. 13; Nason v. Directors of Poor for Erie County, 1889, 126 Pa. 445, 17 A. 616.

rectors[4] must be conducted in formal meetings attended by the necessary quorum. Here each side professes to see in 17(3) of the ICC Act language which sustains its position. Plaintiffs cite the statement that "a majority of the Commission [or] of a division * * * shall constitute a *quorum* for the transaction of business" as clearly indicating that a meeting at which the members are physically present with an opportunity to deliberate, exchange views, persuade or be persuaded by the force of argument and ultimately decide and pursue a jointly reached course of action. But on the other hand, §17(3) provides that "the Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business to the ends of justice * * *."

We think that notation voting may be selected by the Commission as a proper manner of dispatching its business. *When* a meeting of the Commissioners assembled together is held, of course, as the Act specified, a majority shall constitute a quorum. But in view of the broad grant to the Commission of authority to control its proceedings, it may select this type of voting procedure as an aid in dealing with its tremendous workload.

The statute does not specifically provide that administrative action be taken concurrently by the deciding members in a formal meeting and we decline to impose such requirement.

Nor is the procedure of notation voting rendered a nullity because not published in the Federal Register. The

[4] 13 Am. Jur., *Corporations* §948.

minute authorizing it is recorded in the official record of the Commission although never published in the Federal Register. We think that the procedure falls within one of the specific exemptions from the requirement of publication. The statute exempts "any matter relating solely to the internal management of an agency." §3(a), Adm. Proc. Act, 5 USCA §1002. The last sentence of §3(a) gives meaning to the exemption. "No person shall in any manner be required to resort to organization or procedure not so published." 5 USCA 1002(a). Obviously the procedure is solely a matter of internal procedure within the Commission. It does not purport to inform parties of the procedure which is to be taken for the presentation of matters to the Commission. It is not designed for the guidance of the public because it in no way affects any steps which interested parties must take or not take in order to obtain, or review, action by the Commission. As the court in Foreman & Clark, Inc. v. National Labor Relations Board, 9 Cir., 1954, 215 F. 2d 396 at 410, cert. denied 348 U. S. 887, 75 S. Ct. 207, 99 L. Ed. 697, stated: "the clear purpose of section 3(a) * * * is to provide a *shield* for a petitioner before * * * [an] agency to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petitioner can strike down the agency's order on the ground that the agency *has not authorized itself* to issue that type of order, by publishing a statement in the Federal Register!" Thus, the procedure of notation voting, otherwise valid, is not ren-

dered invalid because it was not published in the Federal Register.[28]

*C. Lack of Findings in Order Denying Petition for Reconsideration.*

The Commission denied the petition for reconsideration in April 1959 "* * * for the reason that the findings of the Commission are in accordance with the evidence in the applicable law." Plaintiffs contend that with this conclusion and nothing more there is a lack of the basic or essential findings required to support the Commission's order. Amarillo-Borger Express v. United States, N.D. Tex., 1956, 138 F. Supp. 411 (3-judge); appeal dismissed as moot, 352 U. S. 1028, 77 S. Ct. 594, 1 L. Ed. 2d 598; Dixie Carriers v. United States, S.D. Tex., 1956, 143 F. Supp. 844 (3-judge3, appeal dismissed as moot, 355 U. S. 179, 78 S. Ct. 258, 259; 2 L. Ed. 2d 186. The Administrative Procedure Act, 5 USCA §1007(b) requires a statement of findings and conclusions "as well as the reasons or basis therefor." The *Amarillo-Borger* and *Dixie Carriers cases* involve orders entered "for good cause appearing" which vacated and overruled existing Commission orders suspending proposed rates. There were no basic findings and conclusions or reasons therefor to support the order overruling the prior controlling orders except the cryptic phrase "good cause appearing." The court held: "The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the

[28]Cf. Columbia Research Corp. v. Schaffer, 2 Cir., 1958, 256 F.2d 677; G. J. Howard Co. v. Cassidy, E.D.N.Y., 1958, 162 F.Supp. 568, 574; Pinkus v. Reilly, D.N.J., 1957, 157 F.Supp. 548.

'reasons or basis therefor'." Amarillo-Borger Express v. United States, supra, 138 F. Supp. 411 at 420. The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the "findings of the Commission [are] in accordance with the evidence and the applicable law" is obviously a statement that the Commission is standing behind the original detailed and articulate findings and conclusions. The law requires no more.

*D. Use of Attorney-Advisers*

Plaintiffs contend that the Commissioners used attorney advisers, who were not qualified as APA hearing examiners, to review the record of the proceedings conducted by the Hearing Examiner (together with the exceptions and replies to the Examiner's report) and make recommendations—which were never served upon the parties—to aid the Commissioners in reaching their decisions. This was, they urge, especially harmful in this case since the final report rejected the recommendations of the Hearing Examiner. The Commission, although contending that the issues were not raised before the Commission and should not properly be considered by this court, United States v. Tucker Truck Lines, 1952, 344 U. S. 33, 36, 73 S. Ct. 67, 97 L. Ed. 54; Monumental Motor Tours v. United States, D. Md., 1953, 110 F. Supp. 929, 932, does not deny that its practice is to have staff attorney subordinates review the

record and make recommendations. These attorney reviewers do not, however, participate in either the investigating or prosecuting functions of the Commission, nor do they take part in the proceedings before the Hearing Examiner.

There are three stages of review by the attorney reviewer. First, taking the Hearing Examiner's report, exceptions and replies, the reviewer prepares a draft of a final report. This report is a recommendation by the adviser who is expected to arrive at his recommendation through his independent study of the record. This report is then turned over to another reviewer who, unfamiliar with the case, goes over the draft of the initial staff reviewer. This re-reviewer may make changes, but if he disagrees with the draft of the initial reviewer then the draft of the initial reviewer must go to the Commission along with the comments of the re-reviewer. The final step, is by the Review Committee composed of three men of the greatest experience on the staff who take a "quick look" at the report before it goes to the division or Commission. The draft and recommendation is then sent to the Commission.[27]

The crux of the plaintiff's argument is that the Administrative Procedure Act applies to the "Intermediate re-

[27] The Hoover Commission commented upon such a review. Legal Services and Procedure, March 1935, by the Commission on Organization of the Executive Branch of the Government, at page 202: "In some agencies like the Interstate Commerce Commission, moreover, the record made by the hearing examiner is often subject to further review by other officers who have not heard the evidence, before the record is submitted to the agency for final decision. This practice tends to weaken the administrative process by diminishing the responsibility and status of the officer who conducts the hearing."

view" stage to the same extent that it applies to proceedings before the Hearing Examiner. Wong Yang Sung v. McGrath, 1950, 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616; Riss & Co. v. United States, W.D. Mo., 1950, 96 F. Supp. 452, reversed, 1951, 341 U. S. 907, 71 S. Ct. 607, 95 L. Ed. 1345. Specifically, plaintiffs argue, review of evidence in making of recommendations can only be done by Hearing Examiners qualified under §11 of the Administrative Procedure Act, and those recommendations must be served upon the parties who must be given an opportunity to file exceptions to them. The Commission vigorously defends the use of the attorney-reviewer as necessary and essential for effective staff assistance in the internal decisional process of the Commission. Relying mainly on cases[28] decided before the enactment of the Administrative Procedure Act, the Commission contends that the Administrative Procedure Act was not intended to cut off such effective staff assistance.

Plaintiff's argument that the staff review violates the Administrative Procedure Act is based on §7[29] relating

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[28] Morgan v. United States, 1936, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; Morgan v. United States, 1938, 304 U. S. 1, 18, 58 S. Ct. 773, 999, 82 L. Ed. 1129; United States v. Morgan, 1941, 313 U. S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429; Norris & Hirschberg v. SEC, D. C. Cir., 1947, 163 F. 2d 689, 693, cert. denied, 333 U. S. 867, —S. Ct.—, 92 L. Ed. 1145.

[29] "In hearings * * * conducted pursuant to this section—

"(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided * * *." 5 USCA §1006(a).

to the qualifications of the individual who acts and §8(b)[30] relating to the decisions rendered. But §7 provides that an examiner qualified under the Act "shall *preside at the taking of evidence.*" Obviously, the purpose was to govern the qualifications of the individual conducting the hearing, ruling on the admissibility of evidence, and charged with the responsibility of making the record and, where done, the initial decision. It would be difficult to read the language of §7 to include staff assistants who review and make recommendations to aid the Commission in their study of the record of proceedings conducted by the Examiner.[31]

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[30]"In cases in which a hearing is required to be considered in conformity with section 1006 * * *

* * *

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers, the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all of the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, release, or denial thereof." 5 USCA §1007(b).

[31]The use of staff assistants in making recommendations on the record was sanctioned before the passage of the Administrative Procedure Act. See note 28, supra. When Congress undertook to regulate internal agency staff collaborations it did so specifically. In §5(c) of the Act, Congress specifically prohibited consultation between staff members engaged in investigative and prosecuting functions of an agency with those participating in the adjudicatory function of an agency:

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * except as witness or counsel in public proceedings." 5 USCA §1004(c).

(Footnote 31 Continued on Next Page)

The applicable part of §8 provides that before a "decision upon agency review of the *decision* of subordinate officers, the parties shall be afforded a reasonable opportunity to submit * * * (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers * * *." Further, "[a]ll decisions (including initial, recommended, or tentative decisions) shall become part of the record * * *." The contention of the plaintiffs aparently is that any staff recommendation after review of the record of the Hearing Examiner, exceptions and replies, is either a recommended or a tentative decision within the meaning of the section. Reference to other sections, however, indicates that what was contemplated by a "recommended decision" was one made by a Hearing Examiner when the agency itself makes the initial decision without having presided at the taking

(Footnote 31 Continued From Preceding Page)

The *Attorney General's Manual on the Administrative Procedure Act*, 1947, a document of importance in the development of the Administrative Procedure Act, pointed out the need for staff assistance, but also the essential need to separate functions to insure fair and impartial hearings: "The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whom assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while frequently less complex and with narrower policy implication than are often involved in rule making, present in many cases difficult questions of law and policy. * * * In determining such issues, agency heads have consulted with their principal advisers and specialists. Indeed, it is clearly in the public interest that they continue to do so. Section 5(c) does not purport to isolate the agency head from their staff. Rather, in the interest of fair procedure, it merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case that they say he 'disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Attorney General's Manual at 56-57 (1947).

It is significant that Congress in two statutes subsequent to the Administrative Procedure Act has specifically provided for a separate opinion and review section for the Federal Communications Commissions (see 47 USCA §§155(c), 409) and for individual review by a legal assistant for each member of the National Labor Relations Board (see 29 USCA §154(a)).

of evidence. This would also include an initial decision made by a Division under the delegation procedure and in which no hearings are held before an Examiner. This would also include those in which the Examiner's proposed order may become final under §8(a). Section 8(a) provides that decisions or recommended decisions of the Examiner shall become final in the absence of appeal to the agency by the parties or reconsideration on motion of the agency itself.[32]

Similarly, §17(5) of the Interstate Commerce Act provides that findings or orders of an individual commissioner or board shall, in the absence of appeal, become the order of the full Commission.[33] In adjudicatory cases a "tentative decision" is substantially equivalent to a "recommended decision." More often it is regarded as one issued by an agency in rule-making or initial licensing procedure in which no recommended or initial decision by the Hearing Examiner is involved. Or, as the term implies, it may be one in which the agency or the hearing officer couches the order in terms which will be followed unless the parties show good reason to the contrary.

The distinction between the function of a Hearing Examiner and the Commission (or a division of it) must be

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[32] 5 USCA §1007(a): "* * * Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency."

[33] 49 USCA §17(5). Staff recommendations on the other hand have no such finality until they have actually been adopted by the Commission or by division. To read §8(b) as requiring that all staff memoranda be subjected to exceptions and replies and be placed in the record would effectively destroy their usefulness in aiding the individual commissioners in the decisional process.

kept carefully in mind. Much is committed to the Examiner and the aim of the APA was to give him a position of judicial independence and disinterestedness. His findings and conclusions, or recommended action, will have great significance. But the final decision is that of the Commission. The Commission is not, as would be the case of a court reviewing a trial judge's non-jury decision or the action of an administrative agency under clearly erroneous or substantial evidence concepts, bound by the Examiner's decision. It is, of course, a relevant and important part of the administrative record. Universal Camera Corp. v. NLRB, 1951, 340 U. S. 474, 492-497, 71 S. Ct. 456, 95 L. Ed. 456, 469-472. But the final decision must be that of the Commission. Consequently it is not a mere matter of the Commission's reviewing the Examiner's proposed report to see whether it is supported by sufficient evidence. That means that in the performance of this duty of ultimate responsibility the Commission and its members may properly call on staff assistance in satisfying the almost insuperable demands on this personal institutional accountability.

Congress is aware of the tremendous volume of business which is the ultimate responsibility of the Commission, and hence the Commissioners. The APA was intended to reach the vice of infection of the adjudicatory body by the partisan views of those having investigatory and prosecuting duties. Congress did not mean to leave this small group of Commissioners bereft of staff assistance in the assimilation of the great flood of formal cases requiring

decision. The decision is still that of the Commissioners. Each bears full legal and personal accountability for that which bears his name or concurrence. The system requires a full public report of reasons and conclusions. With these safeguards Congress deemed the question of the identity and actions of staff assistants to be matters beyond question by the parties.

II.

*Substantiality of the Evidence*

Plaintiffs vigorously attack the granting of both applications on the grounds that they are not bottomed and supported by substantial evidence viewing the record as a whole. Universal Camera Corp. v. NLRB, 1951, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456. Giving color to this argument is the fact that the Commission, while adopting the many factual statements of the Hearing Examiner, rejected the recommendations of the Examiner and reached a directly contrary result. In assaying the substantiality of the evidence supporting the Commission's action, ours is the limited task of determining whether the conclusion of the Commission "finds support in the record as a whole * * * 'even though the court would justifiably have made a different choice had the matter been before it de novo'." NLRB v. Fant Milling Co., 1959, 360 U. S. 301, 309, 79 S. Ct. 1179, 3 L. Ed. 2d 1243; United States v. Pierce Auto Freight Lines, 1946, 327 U. S. 515, 66 S. Ct. 687, 90 L. Ed. 821. §10(e), Administrative Procedure Act, 5 USCA §1009(e). If the Commission has made adequate findings

which are in turn supported by substantial evidence, viewed in the light that the record in its entirety furnishes, a reviewing court may not set the order aside even though the court may disagree with ultimate findings of the Commission. Interstate Commerce Commission v. Union Pacific Railroad Co., 1912, 222 U. S. 541, 547, 32 S. Ct. 108, 56 L. Ed. 308; Rochester Telephone Corp. v. United States, 1939, 307 U. S. 125, 139-140, 59 S. Ct. 754, 83 L. Ed. 1147; Universal Camera Corp. v. NLRB, supra.

It is the duty of the Commission to determine the question of public convenience and necessity—a judgment as to the public interest—in an application for additional transportation facilities under §207(a).[*] Interstate Commerce Commission v. Parker, 1945, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051.

Here the Commission made its findings of public convenience and necessity requiring the granting of the two applications based largely on its judgment that the existing service was unsatisfactory and that the proposed service was feasible and appropriate. The Commission's basic conclusion—which the plaintiffs here vigorously contest—is that "the existing service of Herrin and TSC between Houston and New Orleans is not reasonably adequate to

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[*] §207(a) of the Interstate Commerce Act, 49 USCA §307(a), provides: "* * * a certificate (of public convenience and necessity) shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed * * * and that the proposed service * * * is or *will be* required by the present or *future* public convenience and necessity; otherwise such application shall be denied * * *." (Emphasis supplied.)

meet the present and future requirements of the public for expeditious motor service * * *." ICC Report, supra, 77 MCC at 677. "[Herrin and TSC] have demontrated * * * that they cannot be depended upon to provide the type of service of which they are capable, except when faced with an imminent threat of additional competition." ICC Report, supra, 77 MCC at 666. These conclusions were based largely on complaints of shippers which complaints the Commission stated "characterize the over-all service as undependable." Such complaints fall into two general categories, (1) delay in picking up shipments and delay in making local deliveries and (2) excessive and irregular transit times.

It is inappropriate and unnecessary for us to recite the evidence of the individual witnesses. Over 100 persons support Strickland's application and 40 shippers or receivers support the application of Southern-Plaza. It is sufficient to give a general brief description of the testimony.

Witnesses recited their experience in the years 1954, 1955 and 1956 with respect to unsatisfactory pickup service by the existing carriers. Some of the shippers testified that because of delayed pickup service and their need for prompt shipment, they were forced to deliver shipments to the carrier's docks. Others testifying to the unsatisfactory service theey had received commented upon the noticeable improvement after the filing of the applications by Strickland and Southern-Plaza. The complaints which the Commission was entitled to credit were largely that the

particular carrier failed to pick up shipments on the same day it was requested to do so. In the same vein, some witnesses testified that they found it necessary to pick up their incoming shipments at the carrier's dock if they wanted them the same day the shipment arrived.

The objection which the Board characterized as the "most serious complaint against existing service" was that relating to excessive and irregular transit time. Although the Commission considered some of the delay excusable because of week-end shutdowns, the Commission stated that from the past experience of many of the shippers it was clear that they had been subjected to a substantial amount of mediocre and poor service.[35] Herrin and TSC countered that they hold out and advertised 2-day service as well as overnight service between Houston and New Orleans. Further, as shown in the Examiner's report, in excess of 90% of the shipments handled by Herrin during August 1955 (immediately prior to the hearings) were accorded 2-day or better service. But the carriers hold themselves out to furnish expedited service also and too many shipments, the Commission found, were given inadequate or slow service.

Another facet of the "transient time" problem is a complaint by some of the supporting shippers, from San An-

[35] "Recapitulating certain figures tabulated by the examiner * * * it is noted that of 892 shipments handled by Herrin and TSC for the supporting shippers from Houston to Baton Rouge, only 379, or about 35 percent, were afforded 1-day service, 207 were afforded 2-day service, and 106 or about 15 percent required 3 days or more for delivery. Of 616 shipments handled by Herrin and TSC for the supporting shippers from Houston to New Orleans, 166 or about 27 percent were afforded 1-day service, 391 were afforded 2-day service, and 59 required 3 or more days." ICC Report, 77 MCC 655, 664.

tonio, of delay incidental to the interchange of freight at Houston. Specific instances of such delay are recited in the evidence.

The evidence adequately supports the Commission's ultimate finding. It is the conventional type of evidence usually submitted to the Commission in proceedings of this kind calling for the evaluation of many variable factors and the exercise of sound judgment to reach an equitable and fair decision. The evidence adduced supports the statements of underlying reasons made by the Commission. And the evidence showing a noticeable increase in satisfactory service shortly prior to the hearings on these applications further supports the basic conclusion of the Commission on the need for additional service. If the prospect of additional competition brings about such beneficial results, surely the Commission in the exercise of its informed judgment could find that the additional carriers would give a healthy climate of controllable competition without being destructive to the position of thee existing carriers.

The applicants' proposed service contemplates service between all points which they now serve, on the one hand, and on the other, New Orleans and points between Houston and New Orleans. The applicants both propose regularly scheduled overnight service between Houston and New Orleans. Strickland also proposes a number of schedules between Houston and the principal intermediate points and plans to have terminals at those intermediate points. It plans to have service between those small intermediate points provided generally by so-called peddle runs. The

Commission concluded "the schedule set up by applicant governing their proposed operations between Houston and New Orleans are * * * entirely reasonable; and we have no basis to doubt that either applicant can, or would, maintain the service proposed if the instant applications are granted."

The Commission concluded that the amount of additional service resulting from the granting of the applications would not endanger the existing services of Herrin and TSC. This was based upon its informed judgment that the amount of traffic available, based in part on figures submitted by Herrin and TSC,[36] is or will be sufficient to support the additional operation of both applicants between Houston and New Orleans.[37]

The Commission granted Strickland the "northern" route and Southern-Plaza, the "southern" route. Thus Baton Rouge will be served by Strickland alone and Lafayette will be served by Southern-Plaza alone. There will be no added competition in the local service between New Orleans and Baton Rouge and between New Orleans and Lafayette

[36] Figures submitted by Herrin and TSC indicated a daily average tonnage of 830,000 pounds handled between Houston and New Orleans 110,000 pounds between Beaumont and New Orleans, 117,000 pounds between Houston and Lake Charles, 97,000 pounds between Houston and Baton Rouge, and 141,000 pounds between Houston and Lafayette.

[37] This is the point on which one commissioner dissented. 77 MCC 655, 670-71: "Considering * * * the fact that no need has been shown for greater quantum, as distinguished from quality, of service, I am not convinced that the record justifies the granting of the two applications. To double the number of direct single-line carriers between the terminal here involved and dilute the available traffic possibly to such a considerable extent that it might eventually result in deteriorated service as well as produce unsound transportation policy. I believe, therefore, that if any authority is to be granted, it should be to one applicant only. * * *."

and points intermediate thereto since the Commission imposed restrictions to protect such existing local services.[8]

*Complaint of Intervenors Central and East Texas*

These two intervenors operate between Beaumont-Orange and Houston although East Texas has a somewhat restricted authority. They complain that the final order authorizes two new services, "(1) between Orange, Beaumont and Houston and (2) between Orange, Beaumont and other points on U. S. Highway 90 intermediate to Orange and Houston, on the one hand, and, on the other, San Antonio, Fort Worth, Dallas, St. Louis, Chicago, and other points now authorized to be served direct by Strickland and Southern-Plaza." They further assert that there is no evidence that public convenience and necessity requires such services, nor are there requisite findings in the report to support those conclusions. They point to the "manifest inconsistency within the report as between involved local services in Louisiana and local services in Texas, and as between proposed off-route services and proposed through services from Beaumont and Orange to the west and north, and vice versa."

There does not seem to be any serious dispute between the intervenors and the applicants concerning what the testimony was before the Hearing Examiner with respect to truck service to and from Orange and Beaumont. The testimony of the witnesses to which we have been referred

[8] Service at Baton Rouge was restricted to traffic moving to or from points west of the Louisiana-Texas state line. Service at Lafayette and intermediate points between Lafayette and New Orleans was restricted to traffic moving to or from points west of the Louisiana-Texas state line.

deals in every case, except one, R. W. Smith and Company,[9] with shipments between Orange and Beaumont on the one hand, and points in Louisiana on the other. It may be fairly said that there was no showing of inadequate service from Orange and Beaumont, on the one hand, and Houston on the other. Therefore, the question is resolved into a question of law. That is, must there be adequate evidence of public convenience and necessity for additional service between Beaumont-Orange and Houston to support the specific service award here challenged?

Strickland already has authority to carry from Houston to Beaumont, but not in the reverse direction. Southern-Plaza had no authority to carry between Houston and Beaumont or Orange or reverse. Strickland and Southern-Plaza urged that the question is merely whether "tacking" should be allowed. The "tacking" argument would apply to Strickland's Houston to Beaumont service. And so far as points west or north of Houston, such as San Antonio, Ft. Worth, Dallas, St. Louis, Chicago, which Strickland and Southern-Plaza were previously authorized to serve, the new authority is properly regarded as "tacking."[10] The Commission's order is adequate as to evidence and findings to sustain the order with respect to such transportation. But it is incorrect to attempt to justify new service between Beaumont-Orange and Houston on the principle of

[9] Mr. Posey of E. W. Smith and Company testified that he had shipments from Houston to Beaumont, New Orleans, and points further east. On cross examination Mr. Posey said that he had never had any great difficulty with Herrin to Beaumont, and that he had never used TSC to Beaumont.

[10] E.g., M. I. O'Boyle & Son v. Interstate Commerce Comm., D.C. Cir., 1953, 206 F.2d 473, 475; Century-Matthews Motor Freight v. Thrun, 8 Cir., 1949, 173 F.2d 454, 456.

"tacking." Whether a grant of authority between Houston and New Orleans should include authority for local service between Beaumont-Orange and Houston or shipments destined for or originating from such points is obviously a question on which evidence on the need for that particular service must be adduced.

This means that service between Beaumont-Orange and Houston (and intermediate points) was required to be supported by evidence of public convenience and necessity. This extends to shipments originating in Houston or beyond destined to move through Houston to Beaumont-Orange or any points intermediary to Houston and Beaumont-Orange as well as any return shipments going in the reverse direction.

Intervenors Central and East Texas, rely on Hudson Transit Lines v. United States, S.D.N.Y., 1948, 82 F. Supp. 153, affirmed 338 U. S. 802, 70 S. Ct. 59, 94 L. Ed. 485, and Tucker Truck Lines v. United States, E.D. Mo., 1953, 115 F. Supp. 647. Both of these cases involved the setting aside of a certificate of public convenience and necessity which authorized service between intermediate points within the scope of broader rights because of the failure to show the necessity from that particular localized service. So much of the certificate authorizing the service between a particular intermediate point that was not supported by substantial evidence or necessity for the service was set aside.[41]

[41] In Hudson Transit Line v. United States, supra, Adirondack Transit Lines had been given a certificate with respect to long hauls between Paramus, New Jersey, and Monroe, New York, as well as short haul or commuter service between New York City and intermediate points be-

(Footnote 41 Continued on Next Page)

In view of the persuasiveness of these two cases, and the obvious inapplicability of the "tacking" cases cited by applicants, so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside. This will not affect the existing authority of Strickland to operate from Houston to Beaumont, but not in the reverse direction.[42]

*Miscellaneous Objections*

There is no merit to the contention that the Commission failed to consider the adequacy of rail service or the impact of these grants upon such carriers. "Many of the supporting shippers are now utilizing rail service to some extent, but all prefer motor service for expeditious

(Footnote 41 Continued From Preceding Page)
tween Paramus, New Jersey, and Monroe. The court set aside so much of the certificate as dealt with the short haul service, on the grounds that substantial evidence had not been presented and necessity for this phase of the service.

In Tucker Truck Lines v. United States, supra, Pemiscot truck lines was granted authority to run truck service between St. Louis and Memphis and between Memphis and Sikeston, Missouri, and Sikeston, Missouri and St. Louis. Sikeston was only one of the intermediate points between Memphis and St. Louis. The only portion of the certificate attacked was that part which dealt with the authorization of new service between Sikeston and St. Louis. The court held: "There was no evidence before the Commission to sustain the need for granting additional service between St. Louis, Missouri and Sikeston, Missouri, nor was there showing that the present service was inadequate. While the routes over which Pemiscot Motor Freight operated required it to pass through Sikeston in order to render service to other points farther south granted in the certificate, this in the court's opinion is no justification for granting it authority to serve Sikeston." 115 F.Supp. at 649.

[42] As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:

(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,

(2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,

(3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, *a shipment from Baton Rouge to Orange or Beaumont, or the reverse.*)

handling of their smaller shipments. They complain generally of the service received from existing carriers, both motor and rail." ICC report, supra, 77 MCC 655, 660.

Plaintiffs' contention that the Commission failed to make findings in terms of the national transportation policy[1] has no merit.

The report of the Commission is a detailed, careful, and articulate exposition of its judgment as to the adequacy of the existing services, the present and probable future need for additional services, the desirability of such additional services as a result of a controlled competition, and its judgment as to the effect the additional service will have on existing carriers. Unless, as in cases like Pacific Island Tariff Bureau v. United States, (D. Ore. 3 judge), 1955, 129 F. Supp. 472, and Schaeffer Transportation Co. v. United States, 1957, 355 U. S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117, where special problems exist, it would be mere tautology for the Commission to repeat formal declarations in terms of the national transportation policy. Obviously the entire report with its many basic findings clearly demonstrates that the Commission applied "its familiarity with transportation problems to these conflicting considerations." American Trucking Association, Inc. v. United States, 1953, 344 U. S. 298, 73 S. Ct. 307, 316, 97 L. Ed. 337.

Finally, the Commission did not abuse its discretion in denying the petition for rehearing. United States v. Pierce

[1] The national transportation policy is set forth in 49 USCA, preceding §§1, 301, 901 & 1001.

Auto Lines, 1946, 327 U. S. 515, 534-536, 66 S. Ct. 687, 90 L. Ed. 821; Interstate Commerce Commission v. Jersey City, 1944, 322 U. S. 503, 514-518, 64 S. Ct. 1129, 88 L. Ed. 1420.

Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside, the matter is remanded to the Commission for further consistent proceedings.

AFFIRMED IN PART, REMANDED IN PART.

United States Circuit Judge

United States District Judge

United States District Judge

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## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

---

T.S.C. MOTOR FREIGHT LINES, INC., and
HERRIN TRANSPORTATION CO., INC.,
*Plaintiffs,*

and

CENTRAL FREIGHT LINES, INC., and
EAST TEXAS MOTOR FREIGHT LINES, INC.,
*Intervening Plaintiffs,*

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., and
STRICKLAND TRANSPORTATION CO., INC.,
*Defendants.*

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CIVIL ACTION

No. 12,620

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JUDGMENT

BE IT REMEMBERED that on September 22, 1959, came on for trial the above entitled and numbered cause, and thereafter, on August 1, 1960, the court filed its opinion in said cause and does hereby render judgment as follows:

"Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside the mat-

ter is remanded to the Commission for further consistent proceedings.

"AFFIRMED IN PART, REMANDED IN PART."

DATED at Houston, Texas, this the 28 day of November, 1960.

John R. Brown
United States District Judge

Ben C. Connally
United States District Judge

Joe Ingraham
United States District Judge

APPROVED AS TO FORM:

Jack Binion
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## APPENDIX C

M-9565

INTERSTATE COMMERCE COMMISSION

No. MC-59680 (Sub-No. 117)[1]

STRICKLAND TRANSPORTATION CO., INC.,
EXTENSION—LOUISIANA ROUTES

*Decided October 14, 1958*

In Nos. MC-59680 (Sub-No. 117) and MC-10928 (Sub-No. 26), public convenience and necessity found to require operation by the respective applicants as common carriers by motor vehicle of general commodities, with exceptions, between Houston, Tex., and New Orleans, La., over described regular routes, serving all intermediate points, subject to certain restrictions. Issuance of certificates approved upon compliance by applicants with certain conditions, and applications in all other respects denied.

*Ewell H. Muse, Jr.*, for applicant in No. MC-59680 (Sub-No. 117), and for intervener in opposition in No. MC-10928 (Sub-No. 26).

[1]This report also embraces No. MC-10928 (Sub-No. 26), Southern-Plaza Express, Inc., Extension—Louisiana Routes.

*Clarence D. Todd, Charles W. Singer, Dale C. Dillon*, and *Charles F. Riddle* for applicant in No. MC-10928 (Sub-No. 26), and for intervener in opposition in No. MC-59680 (Sub-No. 117).

*M. Ward Bailey, Walter Caven, Louis I. Dailey, Leroy Hallman, John Paul Jones, James W. Nisbet, Carl L. Phinney, Ralph W. Pulley, Jr., Philip Robinson, Reagan Sayers, Scott P. Sayers, Herbert L. Smith, James D. Smullen, Ed White*, and *R. F. Williams* for protestants and interveners in one or both of the applications.

## REPORT OF THE COMMISSION

*By the Commission:*

These proceedings were heard in part on a consolidated record[2] and were the subject of a single report of the examiner to which were appended separate recommended orders proposing the denial of both applications. Separate exceptions were filed by the respective applicants to the orders recommended by the examiner, and joint reply was filed by the opposing carriers. Our conclusions differ from those recommended.

By application in No. MC-59680 (Sub-No. 117), filed June 21, 1954, as amended, Strickland Transportation Co., Inc., hereinafter called Strickland, of Dallas, Tex., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common

[2]Together with No. MC-10928 (Sub-No. 21), which duplicates the authority sought in No. MC-10928 (Sub-No. 26), and which has since been dismissed.

carrier by motor vehicle of general commodities, except those of unusual value, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston, Tex., and New Orleans, La., (1) over U. S. Highway 90, through Beaumont, Tex., and Lake Charles, Lafayette, and Houma, La., and (2) over U. S. Highway 90, 165, 190, and 61, through Beaumont, Lake Charles, Opelousas, La., and Baton Rouge, La. The two routes are identical between Houston and Iowa, La., at which point they separate and converge upon New Orleans from both the south and north. Authority is sought to serve all intermediate points on each route and off-route points within 25 miles of New Orleans and Orange, Tex., and within 15 miles of Baton Rouge and Lake Charles.

By application in No. MC-10928 (Sub-No. 26), filed September 26, 1955, Southern-Plaza Express, Inc., hereinafter called Southern-Plaza, of St. Louis, Mo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with the exceptions noted above, between Houston and New Orleans over U. S. Highway 90 (route 1, described above), serving all intermediate points and off-route points within 10 miles of New Orleans, within 12 miles of Lake Charles, and within the Houston commercial zone as defined by the Commission.

The two applications have been the subject of extensive hearings, and a voluminous record has been compiled. The proceedings mark the second major undertaking, within a decade, to establish a need for additional motor transporta-

tion facilities between the points and over the routes involved. By similar applications filed in August 1947 Strickland, Southern Express, Inc. (predecessor to Southern-Plaza), and Alamo Motor Lines, which is a protestant in the instant proceedings, sought authority to extend their existing lines easterly from Houston into New Orleans. The basic issues presented then were substantially the same as those here. The 1947 applications were also the subject of extensive hearings and a voluminous record. On that record former division 5 by its report of January 15, 1952, found that public convenience and necessity required operation by the 3 applicants between Houston and New Orleans over U. S. Highway 90, serving all intermediate points, with some variation as between the separate applicants, and certain off-route points; but in its report on reconsideration, *Southern Exp., Inc., Common Carrier Application*, 62 M. C. C. 35, decided June 10, 1953, we reversed the findings of division 5 and denied all 3 applications. Petitions for reconsideration and further hearing were denied on June 7, 1954, and the instant applications were filed shortly thereafter. Although the Southern-Plaza application here considered was not filed until September 26, 1955, it was preceded by another application, No. MC-10928 (Sub-No. 21), filed June 28, 1954, in which a substantially similar proposal was advanced, and which was dismissed as being duplicative of, and included in, the application here considered.

Both of the present applicants are now engaged in operation as common carriers by motor vehicle of general freight over regular routes extending between points in several

States. Both serve a number of points in Texas, particularly those within a triangular shaped area with Dallas and Fort Worth at the apex and with San Antonio and Houston at the two corners of the base. Both operate between points in that area and Chicago, with Strickland serving such intermediate points as Shreveport, La., Little Rock, Ark., Memphis, Tenn., and St. Louis, and with Southern-Plaza serving such intermediate points as Oklahoma City and Tulsa, Okla., Kansas City, Mo., and St. Louis. Strickland holds authority to operate from Houston to Beaumont, over the route here involved, but not in the reverse direction. Southern-Plaza operates a line extending westerly from San Antonio as far as El Paso, Tex.

The extension between Houston and New Orleans here sought would be operated by both Strickland and Southern-Plaza in conjunction with all presently authorized routes, and hence the instant proposals may be said to contemplate service between all points now served, on the one hand, and, on the other, New Orleans and points in Texas and Louisiana intermediate to Houston and New Orleans. In providing service to the latter points, however, it would be necessary that all traffic be funneled through Houston, which would require a substantial amount of circuity of operation except with respect to movements between Texas points now served and those Texas and Louisiana points here proposed to be served. Both applicants presently serve San Antonio, Dallas, and Fort Worth, and both operate between such points and Houston. Thus, the granting of the instant applications would permit the establishment of single-line serv-

ices between the named Texas points, on the one hand, and, on the other, New Orleans and points intermediate to Houston and New Orleans.

The applications are opposed by the rail carriers operating in the affected territory, by a large number of motor carriers,[3] and by Gulf Canal Lines, Inc., a water carrier. Many of the opposing motor carriers failed to present evidence as to the nature and extent of their operations; and their interest in the proceedings, if any, cannot be determined from the record. Of those motor and rail carriers which submitted evidence, only a few operate between the points or over either of the routes covered by the applications. The interest of most of the opposing carriers arises from the fact that they now participate with other carriers in joint-line service between points on their lines and points covered by the applications. Those of the opposing motor carriers, the existing operations of which would be duplicated by a grant of the authority here sought are: Herrin Transportation Company and T. S. C. Motor Freight Lines, Inc.,

[3] Alamo Motor Lines, Baggett Transportation Company, Arkansas Motor Freight Lines, Inc., D. A. Beard Truck Lines Co., Brown Express, Campbell Sixty-Six Express, Inc., Central Freight Lines, Inc., Consolidated Forwarding Co., Inc., Cook Truck Lines, Inc., Couch Motor Lines, Inc., Delta Motor Lines, Inc., East Texas Motor Freight Lines, England Bros. Truck Line, Inc., Galveston Truck Line Corporation, George W. Garig Transfer, Inc., Gillette Motor Transport, Inc., Gordons Transports, Inc., Gulf Coast Express, Inc., D. C. Hall Transport, Inc., Herder Truck Lines, Herrin Transportation Company, Mid-Continent Freight Lines, Inc., Merchants Fast Motor Lines, Inc., Kimbel Lines, Inc., Lee Way Motor Freight, Inc., Miller and Miller Motor Freight Lines, O. S. T. Transportation Co., Pitrie Bros. Transfer, Pic Freight Co., Powell Bros. Truck Lines, Red Ball, Inc., Red Ball Motor Freight, Inc, Riss & Company, Inc., Louis Saia Motor Freight Lines, Southwestern Transportation Company, Sunset Motor Lines, T. S. C. Motor Freight Lines, Inc., Texas Arizona Motor Freight, Inc., Thru Truck Service, Viking Freight Company, Walsh Freight Lines, Inc., Western Truck Lines, Ltd., and Young's Motor Freight Lines.

hereinafter called Herrin and TSC respectively, both of which operate between Houston and New Orleans over the routes involved serving all the points sought herein; D. C. Hall Transport, Inc., and Couch Motor Lines, Inc., hereinafter called Hall and Couch, respectively, which operate between Baton Rouge and New Orleans over the northern route described in the Strickland application; George W. Garig Transfer, Inc., which operates between Baton Rouge and New Orleans over routes not here involved; and Louis Saia Motor Freight Lines, which operates between Lafayette, La., and New Orleans, over the southern route described in the applications. Herrin and Hall also operate between Dallas and New Orleans, and Hall also serves Fort Worth. Their lines between such points through De Ridder and this report, are substantially shorter than those which applicants would establish through Houston.

Those of the opposing rail carriers whose lines parallel the routes described in the applications are: The Texas and New Orleans Railroad Company, which operates a line between Houston and New Orleans closely paralleling the southern route described in the applications; the Missouri Pacific Railroad Company, which operates between the same termini over a line closely paralleling the northern route described in the Strickland application; and the Illinois Central Railroad Company, which operates between Baton Rouge and New Orleans over a line paralleling the northern route. Direct rail service is, of course, available between points on the routes here involved and principal Texas points now served by applicants.

The examiner recommended that both of the instant applications be denied, and the report which accompanied his recommended orders contains an exhaustive statement of the pertinent facts of record. There is no serious dispute as to these facts, but each applicant takes vigorous exception to certain of the conclusions based thereon reached by the examiner, particularly with respect to his appraisal of certain evidence. An examination of the record indicates that, except to the extent hereinafter indicated, the pertinent facts are accurately stated in the examiner's report. In the circumstances, we shall adopt the examiner's statement as our own, and we shall restate or enlarge upon the factual situation only to the extent desirable for an adequate discussion of the issues raised by the exceptions.

Strickland takes specific exception to some 40 findings and conclusions of the examiner, and Southern-Plaza attacks such findings and conclusions in 8 specific respects. The principal contentions raised are: (1) that the examiner gave little, if any, weight to the economic growth of the territory covered by the applications and to the alleged monopolistic position of the carriers now serving the territory, (2) that he erred in finding that the services of existing carriers are reasonably adequate to meet the requirements of the supporting shippers, and (3) that there is no proper basis for the doubts expressed by the examiner that the additional services proposed by the respective applicants, if authorized, would be any more consistent, dependable, or otherwise more adequate than those now provided by existing carriers. In their joint reply the opposing carriers urge that the findings and

conclusions of the examiners are abundantly supported by the record, and that the applications should be denied.

Applicants' contentions concerning the importance of the economic growth of the area considered and the fact that in the face of such growth there has been no substantial change in the competitive situation from a transportation standpoint have, in our opinion, little merit. There can be no doubt that the Gulf Coast area here involved has undergone a substantial increase in industrialization and economic growth since World War II, and that further expansion along such lines may reasonably be expected for some time in the future. Factors of economic growth are, however, important in determining the issues here presented only to the extent that such growth has resulted or may reasonably be expected to result in an increased demand for transportation facilities which the existing carriers cannot meet because they have not kept pace with such increased demand. Similarly, we are not concerned so much with the number of carriers operating between the points involved as we are with the quantum and quality of the overall service provided, and applicants' allegations that Herrin and TSC enjoy a virtual monopoly on motor transportation between Houston and New Orleans is important only to the extent that service to the public may be said to have deteriorated or failed to keep pace with the times as a result of there being a lack of competition between such points. Thus, the economic growth of the area and the alleged monopolistic position of existing carriers are relative matters which are entitled to consideration only insofar as they bear upon the basic issue of whether the existing trans-

portation services are reasonably adequate to meet the transportation requirements of the shipping public in the area.

As shown in the examiner's report, over 100 persons support the authority sought by Strickland, and 40 shippers or receivers support the application of Southern-Plaza. Five of the latter shippers also testified in support of the Strickland application. The pertinent evidence presented by these persons is set forth in appendixes I and K of the examiner's report. Many of the supporting shippers are now utilizing rail service to some extent, but all prefer motor service for expeditious handling of their smaller shipments. They complain generally of the service received from existing carriers, both motor and rail. For the most part they do not contend that the existing motor-carrier service is consistently poor, but urge that the ratio between good and poor service is such as to characterize the overall service as undependable. Complaints against existing rail service are concerned primarily with excessive transit time. The complaints against motor service fall into two general categories, (1) delays in picking up shipments at shippers' places of business and in delivering at consignees' places of business, and (2) excessive and irregular elapsed time between pickup and delivery. Most of the supporting shippers express a desire for a consistent motor service of the type proposed; and to many, the element of consistency is of considerable importance even though they may not require expedited service in all instances.

Applicants both propose regularly scheduled overnight service between Houston and New Orleans, in both directions. Strickland also proposes a number of schedules between Hous-

ton and principal intermediate points, and between New Orleans and such points. It plans to establish terminals at such intermediate points. Southern-Plaza would operate intermediate-point schedules between New Iberia, La., on the one hand, and, on the other, New Orleans and Houston. Service to and from the small intermediate points will be provided generally by so-called peddle runs radiating from the terminals, and the transit time on shipments handled to and from such smaller points will be lengthened somewhat, being described as next-day, rather than overnight, service. In other words, a shipment dispatched from Houston to one of the smaller points will be delivered to the terminal nearest the destination on the morning following dispatch, and will be delivered at destination some time later in the day. The schedules set up by applicants governing their proposed operations between Houston and New Orleans are, we believe, entirely reasonable; and we have no basis to doubt that either applicant can, or would, maintain the service proposed if the instant applications are granted. The distance between Houston and New Orleans over the northern route through Baton Rouge is 364 miles, and over the southern route through Houma is about 30 miles longer. Strickland's proposed schedules between the termini are based upon the 364-mile figure and call for an elapsed transit time of 11½ hours, at an average speed of less than 32 miles per hour. Southern-Plaza's through schedules between the termini, over the southern route, with a 1-hour layover at New Iberia, contemplate an elapsed transit time of 13½ hours and also may be accomplished by maintaining an average speed of less

than 32 miles per hour. There is nothing unusual about these running times and average speeds, considering the nature of the terrain. Herrin has 4 schedules daily between Houston and New Orleans which call for an elapsed running time of about 9.5 hours, and TSC purportedly maintains an elapsed running time of 11 hours between the same points.

Both applicants also propose an expedited service between points on their existing lines, such as San Antonio and Dallas, on the one hand, and New Orleans, on the other. Strickland's proposed schedules between San Antonio and New Orleans, 560 miles, call for an elapsed running time of 19.5 hours, including a 1-hour layover at Houston, and an average speed of less than 32 miles per hour. Its proposed schedules between Dallas and New Orleans, 608 miles, call for an elapsed running time of 19.5 hours, with an average speed of slightly more than 32 miles per hour. Next-day service is possible under these schedules only if shipments are tendered in time for a late afternoon dispatch, in which event they can be delivered to consignees in the afternoon after a late moring arrival at the destination terminal. Southern-Plaza has not submitted specific proposed schedules between San Antonio and Dallas and New Orleans, and there is some question as to the exact nature of its proposal in this respect. It would appear, however, from the contentions raised on exceptions, that it proposes a 2-day service between San Antonio and New Orleans and between Dallas and New Orleans, with somewhat better transit time to and from intermediate points west of New Orleans. Although it is possible to maintain next-day delivery between Dallas, Fort Worth, and San

Antonio, on the one hand, and New Orleans, on the other, the likelihood of applicants being able to render such a service regularly and consistently is not as certain or probable as in the case of the proposed service between Houston and New Orleans.

Rail service between the points involved is generally slower than the existing motor service. Since most of the supporting shippers prefer motor service because of the shorter transit time experienced, we shall confine our discussion here primarily to the adequacy of the existing motor facilities. The experiences of the supporting shippers with rail service are fully and adequately stated in the examiner's report.

*Pickup service.*—A number of the supporting shippers complain of the pickup service rendered by existing motor carriers. Most of the complaints are concerned with pickup service at Houston and Dallas, but some refer to service at other points such as New Orleans, Baton Rouge, Beaumont, Orange, and Lake Charles. The complaints are confined generally to situations where the pickup is not made on the same day the carrier is requested to do so. Only one of the supporting shippers, Ceco Steel Products Corporation, of Houston, keeps a record of its pickup requests. It submitted an exhibit indicating that TSC failed to make pickups on the date ordered in the case of 9 out of 15 requests in January 1955; 14 out of 21 requests in February 1955; and 7 out of 20 requests in March 1955. It agrees that the TSC service has been good since July 1955, immediately prior to the hearings herein.

TSC submitted a series of exhibits based upon records maintained at its Houston terminal for several months in 1955. In some instances the data presents a substantially different picture than that presented by the supporting shippers orally, and, as shown in appendix K of the examiner's report, differs in a number of respects from the documentary evidence presented by Ceco Steel Products Corporation. The TSC pickup service at Houston, based on its records, is summarized in appendix L of the examiner's report. It shows a marked improvement in pickup service during September and October 1955, after the commencement of the hearings on these applications.

A few shippers complain of delayed local deliveries, indicating that they sometimes find it necessary to pick up their incoming shipments at the carrier's docks if they want them the same day they arrive.

*Transit time.*—The most serious complaint against existing service is that relating to excessive and irregular transit time. Many of the complaining shippers submitted exhibits depicting the transit time experienced in connection with shipments moving between the points involved. Such exhibits do not include all shipments during the periods reported, and in a number of instances the opposing carriers submitted similar exhibits depicting the service performed by them on other shipments handled for the same shippers. In summarizing this information in this report, the examiner made certain "corrections" concerning the number of days the shipments were in transit, and applicants take issue with his conclusions in this respect. Most notably, they

object to his conclusion that in case of a conflict between a shipper's record of delivery and the carrier's record, the latter should prevail. We cannot accept the general proposition that a carrier's records are accurate and that a shipper's records are not, or that the carrier's records are more likely to be accurate than those of the shopper. However, neither of the applicants point out in their exceptions the specific instances in which the examiner resolved such discrepancies in favor of protestants, and our examination of the record indicates that the number of "corrections" made by the examiner in this respect is not such as would make any material difference in the conclusions hereinafter reached on the matter of transit time. In any event, the "corrections" made by the examiner definitely favor protestants.

Strickland also objects to the elimination by the examiner of intervening weekends and holidays in his computation of transit time. This appears to have been done in order to provide a simple basis for comparing transit times without having to indicate as to each shipment discussed whether the elapsed time shown between pickup and delivery involved a weekend during which time the actual delivery may have been impossible or impracticable. A shipment dispatched from Houston on a Friday normally will not be delivered to a New Orleans consignee until the following Monday, regardless of the time the shipment arrived at the delivering carrier's New Orleans terminal. We find no serious objection to the computations made by the examiner on this basis, particularly since the common practice of the carriers involved affords some excuse for delay deliveries attri-

butable to weekend shutdowns, and more particularly where, as here, the proposed schedules of each applicant indicate that a similar practice will prevail in their operations. Strickland's proposed schedules, for example, provide for the daily dispatch of vehicles from Houston except on Saturdays and Sundays, and, although Southern-Plaza proposes a dispatch 6 days a week, there is still likelihood of delays in those instances where the goods will arrive at destination on weekends or holidays when consignees are unable, or unwilling, to accept delivery. Our examination of the record indicates that the great majority of the "corrections" made by the examiner in this respect involve weekends or similar periods. There are some instances where the elimination of the intervening weekend does not appear to have been entirely proper, particularly where delivery was not accomplished by the carrier on the first business day after the weekend or holiday, but such instances are relatively few in number and do not materially affect the overall picture presented by the examiner's computations. It should be noted, however, that references by the examiner to "1-day service" frequently relates to situations involving intervening weekends where the carrier had the shipment in its possession for more than 1 day, was able to perform terminal services in respect thereof, and delivered it to the consignee on the first business day following the weekend or holiday.

Considering the experiences of the supporting shippers, as evidenced by shipping documents presented either by such shippers or by the carriers whose service is challenged, the conclusion is inescapable that their complaints as to exces-

sive and irregular transit times on shipments between the points and over the routes embraced in the application are well founded; and that their desire for a more expeditious and consistent motor service is understandable and reasonable. Herrin and TSC, which provide all or virtually all the motor service between these points, have demonstrated their ability to provide such a service, but have not done so regularly and consistently. Recapitulating certain figures tabulated by the examiner, and bearing in mind that the examiner's tabulations favor these protestants somewhat, as discussed above, it is noted that of 692 shipments handled by Herrin and TSC for the supporting shippers from Houston to Baton Rouge, only 379, or about 55 percent, were afforded 1-day service, 207 were afforded 2-day service, and 106 or about 15 percent required 3 days or more for delivery. Of 616 shipments handled by Herrin and TSC for the supporting shippers from Houston to New Orleans, 166 or about 27 percent were afforded 1-day service, 391 were afforded 2-day service, and 59 required 3 or more days. Between Dallas and Fort Worth, on the one hand, and Baton Rouge and New Orleans, on the other, Herrin and Hall, which together provide virtually all the motor transportation available between the points, are shown to have handled 533 shipments for the supporting shippers, of which 98 were delivered in 1 day, 216 in 2 days, and 219 in 3 days or more. From a review of the evidence concerning the past experience of the large number of shippers supporting these applications, it is clear that they have been subjected to a sub-

stantial amount of mediocre and poor service between the considered points.

In an effort to rebut the showing made by the supporting shippers, Herrin, Hall, and TSC submitted a series of so-called service exhibits designed to show the nature of their respective services for all shippers during selected periods. The exhibits purport to show the total number of shipments handled during the period indicated between specified points, the number of days required for delivery, and the percentage of shipments handled in 1, 2, 3 or more days. In computing the transit time involved, Saturdays, Sundays, and holidays are excluded. In their exceptions, applicants renew their objections, previously made at the hearing, to the receipt of these exhibits in evidence, and further urge that, even if found to be admissible, they are entitled to little, if any, weight in determining the issues here considered. We find no error on the part of the examiner in receiving the exhibits in evidence. The question as to the weight to be accorded the evidence in appraising the adequacy of protestants' services, however, is quite another matter which will be discussed more fully below.

A tabulation of the information contained in the so-called service exhibits of Herrin, TSC, and Hall is contained in appendixes S, T, and U to the examiner's report. The material submitted by Herrin covers service during August 1955, and January 1956; that submitted by TSC covers service in June, July, and August, 1955, and January and Febru- 1956; and that submitted by Hall covers service during limited periods in March and July 1955. Hearing on the Strick-

land application was commenced on September 13, 1955, and direct testimony in support thereof was concluded November 4, 1955. It should be noted, therefore, that except as to the showing made by Hall in March 1955, all of the service depicted by the exhibits was performed in selected periods either immediately prior to, or during the course of, the hearing; and that the service shown to have been performed in 1956, was performed after the great majority of the supporting shippers had testified.

A recapitulation of the service exhibits submitted on behalf of Herrin shows that of 6,934 shipments transported between Houston and New Orleans in August 1955, only about 60 percent were afforded 1-day service. Of 6,985 shipments transported by TSC from Houston to New Orleans in June 1955, and from New Orleans to Houston in July 1955, 1-day service was provided on a little less than 33 percent. In January 1956, Herrin's 1-day service between the points increased to 70 percent of the shipments, and TSC's 1-day service in January and February 1956, increased to 51 percent of the shipments. During August 1955, Herrin handled 768 shipments from Houston to Baton Rouge, of which less than 60 percent were handled in 1-day service. During January 1956, this figure was increased to 72 percent. The service exhibits submitted on behalf of Hall shows a substantial amount of poor service. Between Dallas and Fort Worth, on the one hand, and Baton Rouge and New Orleans, or the other, Hall handled 2,190 shipments during the periods indicated. Two-day service was provided on less than 29 percent

of these shipments, and 37 percent are shown to have required 4 days or more for delivery.

Taking these service exhibits at their face value, certain conclusions as to transit time are warranted; namely, (1) that the service of Herrin and TSC between Houston and New Orleans during the few months prior to the hearing was substantially better than that previously provided; (2) that the service of each was further improved during the first month or so in 1956, after these proceedings were well under way and after much of the testimony of the shippers had been taken; (3) that at best, Herrin is shown to have provided 1-day service between Houston and New Orleans 70 percent of the time, and TSC only a little better than half the time, and (4) that the service of Hall between Fort Worth and Dallas, on the one hand, and Baton Rouge and New Orleans, on the other, is shown to be substantially below that which shippers might reasonably expect, and must be classified as poor.

*Interchange.*—A few of the supporting shippers, from San Antonio, complain of delays incidental to the interchange of their shipments at Houston, and Strickland has experienced a few difficulties in delivering interchange freight to TSC at Houston. Although the record is inconclusive as to the reason therefor, and as to the carrier or carriers responsible, it does not appear that interline traffic moves through Houston with the dispatch which might reasonably be expected.

*Discussion and conclusions.*—With reference to the Houston-New Orleans traffic situation, with which we are here

directly concerned, we are of the opinion that the record as a whole establishes a sufficient amount of consistently mediocre and often poor service over the years to justify the conclusion that the opportunity for competition which exists between Herrin and TSC on motor transportation between the points involved has not resulted in the provision of a reasonably adequate service responsive to the best interests of the public. The desire of the large number of supporting shippers for a more expedited service between Houston and New Orleans is entitled to substantial weight. There is nothing in this record to indicate that the improved service demanded by the public and offered by the respective applicants is in any manner inconsistent with sound operating policies or otherwise unreasonable in any respect. Both Herrin and TSC hold themselves out to provide next-morning or next-day service between the considered points and both have demonstrated their ability to perform such service when they choose to do so. They have further demonstrated, however, that they cannot be depended upon to provide the type of service of which they are capable, except when faced with and eminent threat of additional competition.

In our decision in *Southern Exp., Inc., Common Carrier Application*, cited above, decided June 10, 1953, which involved issues substantially the same as those here presented, we stated:

> after the instant applications were filed, both Herrin and T. S. C. improved their services between Houston and New Orleans. Some of the shippers fear, however, that without added competition from one or more of the applicants the improved service will be discontinued.

In our opinion, the record affords no reasonable basis for such a conclusion.

Here, as in the prior proceeding, Herrin and TSC are shown to have materially improved their Houston-New Orleans services after the filing of the instant applications. Even with such improvement, however, Herrin provided next-day delivery on only 60 percent of the shipments transported between Houston and New Orleans in August 1955, and TSC provided next-day service on only 33 percent of the shipments handled between the same points in June and July of 1955. The 70-percent figure attained by Herrin in January of 1956 is more impressive, but we are not convinced that it may be depended upon to continue service on that plane, particularly in view of the deterioration in service noted after the denial of the 1947 applications and the elimination of the competitive stimulus resulting therefrom. TSC's record of only a little over 50 percent next-day service compiled in January and February 1956 is not impressive under any circumstances. We concluded that the existing service of Herrin and TSC between Houston and New Orleans is not reasonably adequate to meet the present and future requirements of the public for expeditious motor service; and that the granting of authority for the institution of some additional service is justified.

The question remains as to the amount of additional service which may consistently be authorized without endangering the existing service of Herrin and TSC. There is a substantial amount of motor traffic moving between Houston and New Orleans and also to and from the principal inter-

mediate points such as Beaumont, Lake Charles, Lafayette, and Baton Rouge. For example, figures submitted by Herrin and TSC indicate a daily average tonnage of 830,000 pounds handled between Houston and New Orleans; 110,000 pounds between Beaumont and New Orleans; 117,000 pounds between Houston and Lake Charles; 97,000 pounds between Houston and Baton Rouge; and 141,000 pounds between Houston and Lafayette. In our judgment, the amount of traffic available for movement between the points involved is amply sufficient to support the additional operation of both applicants between Houston and New Orleans and to and from the intermediate points west of Iowa. Further it is sufficient to support the additional operation of 1 of the 2 applicants to and from intermediate points on the northern route through Baton Rouge and points on the southern route through Lafayette. As heretofore indicated, both applicants seek authority over the southern route, but only Strickland seeks authority over the northern route. In the circumstances, we think the equities of the situation compel a grant of authority to Strickland to utilize the northern route, serving all intermediate points, and a grant to Southern-Plaza to utilize the southern route, also serving all intermediate points. In view of the paucity of evidence concerning a need for additional local service between New Orleans and Baton Rouge and between New Orleans and Lafayette and points intermediate thereto, we shall impose appropriate restrictions on each of the authorities granted to protect the existing local services of Couch, George Garig Transfer, Inc., and Louis Saia Motor Freight Line, heretofore described.

No substantial need has been shown for additional service to and from points in the wide radial areas sought surrounding New Orleans, Baton Rouge, Orange, and Lake Charles, and each application will be denied in this respect.

The granting of authority to the extent heretofore indicated will not, in our opinion, materially endanger or impair the operations of existing carriers contrary to the public interest. Both Herrin and TSC are large carriers with extensive and farflung operations. Herrin's operations extend from principal Texas points, on the west, to Jacksonville, Fla., on the east. TSC's operations extend from Houston as far east as Birmingham, Ala., and the company is controlled by Ryder Systems, Inc., which also controls carriers serving large areas in the East and South. The particular segment of their operations here involved represents only a relatively small portion of their systemwide operations. Even upon the granting of authority herein to the extent noted, they will still enjoy a competitive advantage on traffic moving between Texas points and points beyond New Orleans by reason of the single-line services which they are able to provide through New Orleans.

The proposal of applicants to join or tack any authority granted herein with that presently held for the provision of through service between such Texas points as San Antonio, Fort Worth, and Dallas, on the one hand, and, on the other, the Texas and Louisiana points here directly involved, is only incidental to the basic service proposed between Houston and New Orleans. The carriers to be directly affected by this through operations are Herrin, which operates be-

tween Dallas and New Orleans, through Shreveport and also through De Ridder, La., and Hall, which operates between Fort Worth and Dallas, on the one hand, and New Orleans, on the other, through Shreveport, Alexandria, and Baton Rouge, La. Here again, the directly affected service of Herrin represents only a relatively small portion of its system-wide services. Hall has been acquired by Braswell Motor Freight Lines, Inc., which operates between principal Texas points and Los Angeles, Calif., and hence the portion of the combined operations here involved is very small. Hall's association with Braswell, which permits single-line service between New Orleans and other Louisiana points and points on the west coast, provides it with a competitive advantage over applicants for such traffic. Additionally, the lines of Herrin and Hall are shorter, by about 100 miles, than those which applicants would traverse through Houston, and they should have no difficulty in competing therewith on a service basis. Couch will probably lose some traffic which it has been moving between Shreveport and New Orleans and other southern Louisiana points in conjunction with Strickland, but its loss in this respect will be primarily in connection with traffic originating at or destined to points in Texas, and traffic which has heretofore been routed circuitously through Shreveport in lieu of the more normal routing through Houston. The effect of the granting of the applications on the other motor-carrier protestants will, we think, be minor and in many instances remote. There is no evidence that there will be any materially adverse effect upon existing rail service in the territory for various reasons,

primarily faster deliveries, and on this record it cannot be found that the granting of the applications will result in any substantial diversion of traffic from the railroads.

As seen, Strickland presently holds authority to operate over the proposed route from Houston to Beaumont, but not in the reverse direction. The authority granted herein, to the extent it duplicates that now held by Strickland, shall not be construed as constituting more than a single operating right.

We find in No. MC-59680 (Sub-No. 117) that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston, Tex., and New Orleans, La., from Houston over U. S. Highway 90 to Iowa, La., thence over U. S. Highway 165 to Kinder, La., thence over U. S. Highway 190 to Baton Rouge, La., thence over U. S. Highway 61 to New Orleans, and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the Louisiana-Texas State line; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, and that in all other respects the application should be denied.

We find in No. MC-10928 (Sub-No. 26), that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with the exceptions noted in the finding paragraph above, between Houston and New Orleans, over U. S. Highway 90, through Lafayette, La., serving all intermediate points, but with service at Lafayette and intermediate points between Lafayette and New Orleans restricted to traffic moving to or from points west of the Louisiana-Texas State line; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted; and that the application should be denied in all other respects.

Upon compliance by each applicant with the requirements of sections 215, 217, and 221 (c) of the act and with our rules and regulations thereunder, appropriate certificates will be issued.

An order will be entered denying the applications except to the extent granted herein.

FREAS, *Chairman*, dissenting:

It appears that the complaints of the supporting shippers in these proceedings are directed principally to the lack of consistent and dependable motor service, insofar as time in transit is concerned. There does not seem to be any substantial question that the presently authorized car-

riers have generally kept up with the economic growth of the area and have correspondingly increased the capacity of their fleets and terminal facilities. Assuming that the evidence substantiates a need, rather than a mere desire, for the proposed regular overnight or 1-day service, it may be that additional competition is necessary to spur improvement in service, especially in view of the past history of protestants' operations between Houston and New Orleans. Considering, however, the apparent satisfaction of a large segment of the shipping public with the presently authorized carriers, as is evident from the testimony of numerous witnesses appearing on their behalf, and the fact that no need has been shown for a greater quantum, as distinguished from quality, of service, I am not convinced that the record justifies the granting of the two applications. To double the number of the direct single-line carriers between the termini here involved would dilute the available traffic possibly to such a considerable extent that it might eventually result in deteriorated service as well as produce unsound economic conditions, contrary to the objectives of the national transportation policy.

I believe, therefore, that if any authority is to be granted, it should be to one applicant only; provided, however, that such applicant's assurances that it would render an improved service are supported by substantial evidence of record.

The report does not discuss the relative qualifications of the two applicants for providing a materially better service than that rendered by protestants. The nub of the ques-

tion is whether any one of these applicants can be relied upon to perform the allegedly required service, based upon its past actual record of performance over presently authorized routes when compared with its representations. Indeed, the answer to this question appears to be controlling here in determining whether the interest of the public would be in fact be served by a grant of any of the applications, as well as which one should be selected for approval. In this respect, the evidence seems to cast doubt upon the qualifications of either applicant, although indicating that generally Southern Plaza may have had, comparatively, the better performance record.

COMMISSIONER GOFF dissents.

COMMISSIONERS MITCHELL, HUTCHINSON, and WEBB did not participate in the disposition of these proceedings.

## APPENDIX D

Sections 17 (1), (2), (3) and 207 (a) [49 U.S.C. §17 (1), (2), (3) and 307 (a)] of The Interstate Commerce Act provide as follows: —

Sec. 17. [*As amended March 2, 1889, August 9, 1917, February 28, 1920, February 28, 1933, August 9, 1935, September 18, 1940.*] [*49 U. S. C. §17.*] (1) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner, designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

(2) The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by section 205, and except functions vested in the Commis-

sion under this section), or any other matter which shall have been or may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a "board") to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. The assignment or reference, to divisions, of work, business, or relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged. When an individual Commissioner, or any employee, is unable to act upon any matter so assigned or referred because of absence or other cause, the Chairman of the Commission may designate another Commissioner or employee, as the cause may be, to serve temporarily until the Commission otherwise orders.

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Sec-

retary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

## ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U. S. C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or

any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sections 3, 5, 7, 8 (b) and 11 [5 U.S.C. §§ 1002, 1004, 1006, 1007 (b) and 1010] of the Administrative Procedure Act provide as follows:

## PUBLIC INFORMATION

Sec. 3. [*5 U. S. C. § 1002.*] Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements

of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and Orders.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public Records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Sec. 5. [*5 U. S. C. § 1004.*] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the

United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision

required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory Orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 7. [*U. S. C., § 1006.*] In the hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one

or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received,

but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 8. [*5 U. S. C. § 1007.*] In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * * * *

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon

agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 11. [*5 U. S. C., § 1010.*] Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the

Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislations, subpoena witnesses or records, and pay witness fees as established for the United States courts.

Sections 2.3, 4.1 and 4.2(g) of the Interstate Commerce Commission's Organizational Rules, 23 F. R. 1747 provide as follows:

2.3. Each division with regard to any case or matter assigned to it, or any question brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Commissioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter, or question itself, or may assign or refer the matter to the same or another division.

## ASSIGNMENT OF DUTIES TO DIVISIONS

4.1 Work, business, and functions of the Commission are assigned and referred to the respective divisions for action thereon (including, for each division to which the subject matter or the principal part thereof is assigned, authority to approve recommendations of the Commission's staff for the enforcement of penal provisions of the Interstate Commerce Act, and statutory provisions supplementary thereto), as follows:

4.2 Division One—Operating Rights Division (Commissioners Hutchinson (Chairman), Walrath, and Goff):

* * * * * * *

(g) Sections 206, 207, and 208, relating to certificates of public convenience and necessity.

# Supreme Court of the United States

OCTOBER TERM, 1960

## No. 837

HERRIN TRANSPORTATION COMPANY,
*Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., AND STRICKLAND TRANSPORTATION CO., INC.,
*Appellees*

Appeal From The United States District Court
For The Southern District of Texas

## APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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# Supreme Court of the United States

OCTOBER TERM, 1960

## No. 837

HERRIN TRANSPORTATION COMPANY
*Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., AND STRICKLAND TRANSPORTATION CO., INC.
*Appellees*

## APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee Strickland Transportation Co., Inc., respectfully submits herewith its motion to dismiss the appeal as not in accordance with 28 U.S.C.A. §2001(b) and the rules of the court or in the alternative to affirm the judgment of the District Court on the basis that appellant's jurisdictional statement does not present any questions upon which the decision of the cause depends of such substantial nature as to require further argument.

## STATEMENT OF THE CASE

By application under Section 207(a) of the Interstate Commerce Act in Docket No. MC 59680 (Sub No. 117), filed June 21, 1954, Appellee Strickland Transportation Co., Inc., hereinafter sometimes called Strickland, sought a Certificate of Public Convenience and Necessity authorizing service as a common carrier of property by motor vehicle of general commodities over regular routes between Houston, Texas, and New Orleans, Louisiana, over two routes (1) via Beaumont, Texas, and Lafayette, Louisiana, for convenience referred to as the "northern route," and (2) via Beaumont and Baton Rouge, Louisiana, for convenience referred to as the "southern route." Under its prior existing authority Strickland was authorized to provide such service from Houston to Beaumont but not in the reverse direction.

By similar application, filed September 26, 1955, in Docket No. MC 10928 (Sub No. 26) Southern-Plaza Express, Inc., hereinafter sometimes called Southern-Plaza, sought similar authority to operate over the "southern route" only between Houston and New Orleans.

Following extensive oral hearings before the Commission, conducted by a qualified hearing examiner, the examiner by a single report and recommended order, served October 1957, recommended denial of both applications. Exceptions and replies thereto were duly filed and in accordance with usual procedure the matter came before Division 1 of the Com-

mission which by memorandum, dated July 23, 1958, certified the proceedings to the entire Commission for consideration.

By an extensive written report, reproduced in 77 M.C.C. 655, decided October 14, 1958, the entire Commission granted authority to Strickland over the "northern route" and to Southern-Plaza over the "southern route." Petitions for reconsideration and replies thereto were filed by the parties including appellant and appellee Strickland. In April, 1959, the Commission by an order stating in substance that it believed its previous report and order to be in accordance with the pertinent facts and applicable law denied the petitions for reconsideration thus affirming its previous action.

Appellant and another carrier, not present here on appeal, then commenced the instant cause by suit to set aside the order of the Commission in the United States District Court for the Southern District of Texas. By opinion filed August 1, 1960, 187 F. Supp. 777, the District Court rendered judgment affirming the questioned Commission order in part and remanding it in part for further consistent proceedings before the Commission.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the notice of the appeal was not timely filed and that there has been no showing by appellant that the questions involved are of such substantial nature as to need further argument, and such have been so plainly fore-

closed by the decisions of the Supreme Court as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

## I.

## THE APPEAL IS NOT TIMELY TAKEN

Following the filing of the opinion of the District Court on August 1, 1960, appellant gave notice of appeal in that court on January 20, 1961. It is the position of this appellee that such was not timely notice of appeal because the opinion of the District Court filed August 1, 1960, constituted a final judgment in the case and that the subsequent entry of a formal judgment on November 28, 1960 could not constitute a second final judgment in the case nor extend the time to appeal.

28 U.S.C.A. §2101(b) governs the filing of notice of appeal in the instant cause and it provides:

> "(b) Any other direct appeal to the Supreme Court which is authorized by law from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Decision of the question of the timeliness of appellant's notice of appeal in the lower court turns on the question of finality of the opinion of the District Court filed August 1, 1960. The question is squarely resolved in *Erstling v. Southern Bell Telephone and Telegraph Company*, 255 F. 2d 93 (5th Cir.—1958).

In that case appellant had instituted suit in a Florida Court which appellee removed to the United States District Court and filed motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6) Federal Rules of Civil Procedure. The District Court granted the motion by order dated July 11, 1957, noted in the Clerk's docket, the operative words of which were:

> "Ordered and Adjudged that the Plaintiff's Complaint be and is hereby dismissed. The Plaintiff declining to plead further, this Order is made with prejudice to the Plaintiff."

On July 25, 1957, an instrument styled "Final Judgment" was signed by the district judge providing:

> "Ordered and Adjudged that the Plaintiff, Julius H. Erstling, take nothing by his suit and the Defendant, Southern Bell Telephone and Telegraph Company, go hence without day and recover its costs in this suit incurred, said costs to be taxed by the Clerk of the Court."

Appellant filed notice of appeal on August 20, 1957, and appellee moved to dismiss as filed too late. While the case deals with appeal to a Circuit Court of Appeals from a District Court, nevertheless, it constitutes square precedent on the question of finality of the District Court order for purposes of computation of time within which to give timely notice of appeal. On this question the Court held on page 95:

> "A recent decision of the Supreme Court has supplied the answers to the questions posed by the motion to dismiss the appeal. *United States v.*

*F. & M. Schaefer Brewing Co.*, 78 S. Ct. 674. No form of words is necessary to evidence the rendition of a judgment. If the language used by the court clearly evidences the judge's intention that it shall be his final act it constitutes a final judgment, and when such intention has been so evidenced and the docket entry has been made a final judgment has been pronounced and entered and the time to appeal starts to run." The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. Such are the principles applicable here as announced in the *Schaefer* opinion.

"In the case before us one of the instruments is styled 'Order' and the other is called 'Judgment.' But as has been noticed, the label is unimportant. In each the operative words are 'Ordered and Adjudged.' In form the 'order' dismisses the plaintiff's complaint with prejudice and the 'judgment' directs that the plaintiff take nothing by his suit and that the defendant go hence without day. The instrument styled 'order' was a direction of the court that 'all relief be denied' and upon the notation thereof in the civil docket, under Rules 58 and 79(a), became a judgment. In any event the legal effect of the language in each of the instruments is the same and either would put an end to the suit. The only difference in the effect of the two instruments is that the one called 'judgment' provides for recovery of costs by the defendant. But an award of costs to be taxed is not of the substance of a judgment where there is a dismissal for failure to state a claim upon which relief may be granted, and since costs are allowed as a matter of course unless the court otherwise directs, Rule 54(d), Fed. Rules Civ. Proc. 28 U.S.C.A., this provision was surplusage.

> "We reach the conclusion that the 'Order' dated July 11, 1957, and entered by the docket notation on July 12, 1957, became a final and appealable judgment when so entered. Hence the appeal of which notice was filed on August 20, 1957, was after the time for appeal had expired and the appeal must be dismissed."

Another excellent discussion of this problem is made in *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U. S. 206. This cause arose out of a proceeding by the F. T. C. wherein a three count complaint was issued against respondent. Following protracted proceedings before the Commission a cease and desist order was issued on all three counts. Respondent petitioned the Court of Appeals for review and by cross-petition the Commission contended for enforcement of all parts of its order, whereupon respondent abandoned its attack on Parts I and II of the order. On July 5, 1951, the court set aside Part III of the order dismissing the complaint upon which it was based. No petition for rehearing was filed and a certified copy of the judgment was issued in lieu of a mandate. Thereafter the Commission filed a memorandum with the court pointing out that no reference was made in the judgment to Parts I and II of the complaint and since no relief had been sought therefrom the court should enter a decree affirming the cease and desist order as to these parts. On September 18, 1951, the court did this by an instrument labeled "Final Decree," wherein its holding with respect to Part III was reiterated. On December 14, 1951, the Commission filed petition for writ of certiorari which was not timely filed unless the 90-day filing period ran from the September 18,

1951, order. The court held that it did not, stating on pages 211-212:

> "Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought.[9] Only when a lower court changes matters of substance,[10] or resolves a genuine ambiguity,[11] in a judgment previously rendered should the period within which the appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order has disturbed or revised legal rights and obligations which, by its prior judgment had been plainly and properly settled with finality.[12]"

On page 212 the court continues:

> "Indeed, the judgment of July 5 was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals.

---

[9] *Department of Banking v. Pink*, 317 U.S. 264; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Credit Co., Ltd. v. Arkansas Central R. Co.*, 128 U. S. 258 (1888).

[10] *Zimmern v. United States*, 298 U. S. 167, 169 (1936); Compare *Department of Banking v. Pink*, supra.

[11] Compare *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952).

[12] Compare *Rubber Co. v. Goodyear*, 6 Wall. 153 (1868) (appeal allowed from second decree, restating most provisions of the first because the first decree, at the time of entry, was only regarded by the parties and the court as tentative); *Memphis v. Brown*, 94 U. S. 715 (1877) (appeal allowed from second judgment on ground that the second made material changes in the first). See *United States v. Hack*, 320 U. S. 531, 533-534 (1944); *Hill v. Howes*, 320 U. S. 520, 523 (1944).

It was neither 'tentative, informal nor incomplete.'"

On page 213, after noting that there must be an end to litigation the court stated:

"It is a principal reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters dealt with on review."

Comparison should be made between the final paragraph of the extensive August 1, 1960 opinion filed by the court in this cause and the judgment rendered November 28, 1960 by the court. The former reads:

"Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside, the matter is remanded to the Commission for further consistent proceedings.

"AFFIRMED IN PART, REMANDED IN PART."

The latter reads:

"JUDGMENT

"BE IT REMEMBERED, that on September 22, 1959, came on for trial the above entitled and numbered cause, and thereafter, on August 1, 1960, the court filed its opinion in said cause and does hereby render judgment as follows:

---

See *Dickinson v. Petroleum Conversion Corp.*, 338 U. S. 507, 514 (1950)

> 'Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside the matter is remanded to the Commission for further consistent proceedings.
>
> 'AFFIRMED IN PART, REMANDED IN PART'."

From the foregoing and the cases noted it is clear that the opinion filed August 1, 1960 left nothing further to be done, that it was directed to all the issues litigated by the parties, that the judgment entered November 28, 1960, in no way disturbed or revised any legal obligations or rights adjudicated theretofore, that the opinion filed August 1, 1960, in no way purports to be tentative, informal or incomplete, that the operative words in both instruments are the same and in either case are sufficient to end the litigation, and that the later formally styled judgment is a later event of no import to the matters to be dealt with on review. Thus, the November 28, 1960 judgment did not toll the running of the time within which to give notice of appeal, and appellant has not given such timely notice in the court below.

That such failure to give timely notice is grounds for dismissal of the appeal is well-settled. See *Whitsitt v. Union Depot, etc. Co.*, 7 S. Ct. 1248, 122 U. S. 363, 30 L. Ed. 1150; *Collard v. Pittsburgh, etc. R. Co.*, 38 S. Ct. 336, 246 U. S. 653, 62 L. Ed. 922; *Glasgow Nav. Co. v. Munson Steamship Line*, 38 S Ct. 215, 246 U. S. 647, 62 L. Ed. 919.

## II.

## THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Initially it must be pointed out that the jurisdictional statement of appellant does not raise the question of the substantiality of the evidence supporting the involved Commission order. In addition the jurisdictional statement contains no specification of prejudice caused by the alleged procedural defects complained of by appellant. Thus, as we understand appellant's position, it is that the Commission's handling of these proceedings on review constituted fundamental error as a denial of "due process."

### A. Certification to the Commission

Following the examiner's report and recommended order and exceptions and replies thereto by the parties, Division 1, to whom such proceedings are normally referred, certified the proceedings to the Commission by vote recorded in a memorandum to Director Coyle. Appellant questions the propriety of the failure of the division to publish a report, that the Interstate Commerce Act, 49 U.S.C.A. §17, or the organizational rules of the Commission provide for such certification, the validity of the vote of the division to certify as not in accordance with the provisions of the Interstate Commerce Act, and the validity of the Commission's action as depriving appellant of a favorable report, or, if unfavorable, the opportunity to petition

for reconsideration with additional briefs pointing out the errors in the division report.

With respect to the first two questions raised in the jurisdictional statement, as noted above, the Interstate Commerce Act, 49 U.S.C.A. §17(1) provides:

> "(1) The Commission is authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. . . ."

Further, the Act, 49 U.S.C.A. §17(4) provides:

> "(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. . ."

Pursuant to which the organizational rules of the Commission in §2.3, 23 F.R. 1747, 1748, provide:

> "2.3 Each division with regard to any case or matter assigned to it, or any questions brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Com-

missioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter, or question itself, or may assign or refer the matter to the same or another division."

Whether the questioned certification in this case is viewed as (1) a request for advice and counsel, (2) the assignment of additional commissioners, or (3) amounting to recall by the Commission through its acceptance of the certification, such action certainly is provided for in the Act and the Commission's organizational rules and complies substantially and in spirit therewith.

On the basis of section 17(3) of the Act, 49 U.S. C.A. §17(3) providing, ". . . Every vote and official act of the Commission, or any division . . . . shall be entered of record, and such record made public upon request of any interested party," appellant challenges the propriety of the vote to certify of the division, recorded by memorandum to Director Coyle, as to which no minute entry was made. The purpose of this provision is to insure adequate knowledge of the parties of official acts which substantially affect their rights. No right to complain or to complain by a certain time was lost to appellant by this action, nor could appellant have in any way opposed recall by the Commission. Thus, how failure to make a minute entry to record the vote of Division 1 to certify the case to the Commission could have resulted in prejudice to appellant is difficult to conceive.

With respect to appellant's contentions concerning

being deprived of a favorable report or the opportunity to petition for reconsideration of an unfavorable report, it is likewise difficult to conceive of how appellant could have been prejudiced by the failure of Division 1 to publish a report as its action resulted in consideration by the Commission and appellant was not deprived of the opportunity to petition for reconsideration with additional briefs, which, in fact, it did.

Appellant's contentions as to the foregoing fail to recognize that these are matters of orderly internal procedure within the Commission, do not require any action by the parties to preserve their rights, and that the rules and statutes clearly contemplate consideration by the entire Commission whenever in its estimation such will best conduce to the proper dispatch of business and the ends of justice. As the jurisdictional statement fails to specify in what respects these alleged procedural defects were prejudicial to it the action of the Commission must stand. As provided in section 10(e) of the Administrative Procedure Act, 5 U.S.C.A. §1009(e), "due account shall be taken of the rule of prejudicial error." See *ABC Freight Forwarding Corp. v. United States*, 169 F. Supp. 403 (S. D. N. Y.—1959), which cites *Market Street Railway v. Commission*, 324 U. S. 561 (S. Ct.—1945).

B. **Notation Voting**

Appellant challenges the validity of the final report of the Commission, 77 M.C.C. 655, on the basis that it was adopted through the procedure of notation voting by the Commission in "constructive session" rather than at a formal session with the members of

the Commission physically present. In the alternative this method of adoption of the report by the Commission is challenged on the basis it was never published in the Federal Register.

While Section 17(3) of the Interstate Commerce Act, 49 U.S.C.A. §17(3), imposes a quorum requirement in order to transact business at formal sessions, there is no express provision in the Act requiring that action be taken only at formal sessions. Further, in the same section it is provided that "the Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . ." In view of the heavy work load and the broad grant of authority contained in the Interstate Commerce Act for the Commission to control its proceedings, in the absence of an express statutory requirement of formal sessions the courts should be hesitant to impose one as such is again a matter of internal procedure within the Commission. In any event there is no basis for reversal of the Commission's action on this account, as any defect in this regard was cured when the full Commission, all members physically present, voted to deny appellant's petition for reconsideration affirming the findings of the report.

Nor is the notation voting procedure, if otherwise valid, rendered invalid due to the failure of the Commission to publish such a procedure in the Federal Register. The minute authorizing such is contained in the official record of the Commission having been adopted at formal session October 2, 1953, all members present, and reads as follows:

"3. CONSTRUCTIVE SESSIONS: ACTION BY NOTATION

"(A) At other than regular or special conferences official action may be taken by the Commission, by any division thereof, or by any board or employees set up under Section 17 of the Interstate Commerce Act, in this purpose (1) a copy of the report, order, or any other document under consideration may be used as a manuscript on which each Commissioner or board member will indicate his vote, or (2) each Commissioner or board member may cast his vote by separate memorandum. In such instances, the participating Commissioners or board members may informally confer, respectively, with one another or exchange their views in writing. If the votes are cast on different days, the date of decision shall be the date upon which the last individual vote is cast. If, before the votes of all others participating in the voting have been cast, any Commissioner or board member shall request, in writing, conference consideration, or if in the judgment of the Commissioner or board member through whose office the votes are to be cleared undue delay in the voting occurs, the subject matter will be transferred to an appropriate conference agenda.

"(B) The vote by memorandum of each Commissioner or board member on a matter circulated for action by notation shall be sent to the Commissioner or board member through whose office the matter is to be cleared. Copies of such vote need not be circulated to the other Commissioners or board members unless it explains the reason for the vote. A copy of the clearance memorandum, however, shall be sent to each Commissioner or board member."

This procedure falls within one of the specific exemptions from publication under section 3 of the Administrative Procedure Act, 5 U.S.C.A. §1001, exempting "any matter relating solely to the internal management of an agency," and the last sentence of section 3(a) of the Administrative Procedure Act, 5 U.S.C.A. §1002(a), clearly protects the parties from such, "no person shall in any manner be required to resort to organization or procedure not so published." The voting procedure was not adopted for the guidance of the parties and compels no action on their parts to secure review or protect their rights. Thus, the voting procedure as an internal matter of the Commission affords appellant no basis for complaint due to its lack of publication. As stated in *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir.—1954); cert. denied 348 U. S. 887, at page 410:

> "The clear purpose of section 3(a) . . . is to provide a *shield* for a petitioner before . . . (an) agency to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petitioner can strike down the agency's order on the ground that the agency *has not authorized itself* to issue that type of order, by publishing a statement in the Federal Register!"

C. **The Use of Attorney-Advisors**

Appellant seeks to raise in this case the question of whether the Administrative Procedure Act, 5 U.S.C.A. §1001, et seq., applies to the "intermediate review" stage of proceedings before the Interstate Commerce Commission by challenging the use of attorney-

advisors by the Commission in the consideration of proceedings before it. Initially it must be pointed out that this question is not properly present for review by the courts at all as appellant entirely failed to raise it before the Commission. In *United States v. Tucker Truck Lines*, 334 U. S. 33, 37, it is stated:

> "Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."

The foregoing is required even though the Commission would be compelled to reject such contentions as simple fairness to the Commission requires it be given opportunity to consider the matter and to present reasons justifying the action. Further, the courts are entitled to a full prior consideration and explanation by the Commission. As stated in the case cited above at page 36:

> "This issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits."

Assuming the point properly raised, for the sake of argument, the Commission defends the practice of using attorney-advisors as necessary and points out that such are not used in investigating or prosecuting functions of the Commission nor do they take part in hearings before the hearing examiner.

Appellant's contention that this method of review is violative of the Administrative Procedure Act is

predicated upon sections 7 and 8 (b) thereof. The fallacy of the contention is readily apparent in that section 7 provides for a qualified examiner at the stage of taking evidence and, according to the practice, writing of the initial, tentative or recommended decision.

The applicable part of section 7 reads:

> "Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> "(a) Presiding Officers. — *There shall preside at the taking of evidence* (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this act; . . . ." (Emphasis ours)

Likewise, the portion of section 8(b) relied upon fails to support appellant's contention. It provides:

> "(b) **Submittals and Decisions.** Prior to each recommended, initial, or tentative decision, or *decision upon agency review of the decision of subordinate officers* the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions or subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. . ." (Emphasis ours)

Thus, under appellant's contention the attorney-advisor's recommendation following review of the record at the intermediate state is a "recommended decision"

under this provision. Such was clearly not contemplated by the Act as reference to other sections reveals. The section only purports to deal with decisions. Until adopted by the division or the Commission, the attorney-advisor's work product is not any sort of "decision." The recommended decision referred to in the Act, in this instance, is the report and recommended order of the hearing examiner.

The use of attorney-advisors was judicially approved prior to the Administrative Procedure Act. See the first, second and fourth *Morgan* cases, 298 U. S. 468; 304 U. S. 1, 18; 313 U. S. 409, 422; and *Norris & Hirschberg v. SEC*, 163 F. 2d 160, 163, cert. denied 333 U. S. 867. It is not to be supposed that the Administrative Procedure Act was intended to do away with their use as provision was made therein to specifically regulate their activities by prohibiting their participation in investigation and prosecution functions under section 5(c) of Administrative Procedure Act, 5 U.S.C.A. §1004(c):

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate to advise in the decision, recommended decision, or *agency review* . . . except as witness or counsel in public proceedings." (Emphasis ours).

As can readily be seen agency review, the "intermediate stage" is clearly distinguished in the Act from decisions or recommended decisions. Thus, of tremendous significance is the omission of any reference to agency review in section 8(b) except as to *decision* on

agency review of the *decision* of a subordinate. Likewise, of great significance is the omission of any prohibition of staff assistant participation except as to investigation and prosecution functions, and in such prohibition the participation of these staff assistants or attorney-advisors was expressly prohibited as to *any participation.*

### D. Lack of Subsidiary Findings In the Order Overruling The Petition for Reconsideration

While the jurisdictional statement enumerates as a question raised on appeal the failure of the Commission to make any subsidiary findings in its order overruling the petition for reconsideration, no discussion with respect to the point is made therein. Nevertheless, this question is clearly foreclosed against appellant, and need not be dwelt upon. As held by the court below the Administrative Procedure Act does not require reiteration of detailed findings with supporting reasons previously made when the agency's previous action is adhered to on attack by the parties. The Commission's order denying the petition in April 1959, ". . . for the reason that the findings of the Commission are in accordance with the evidence and the applicable law," is obviously merely a reiteration of its previously made detailed findings. It is only where the agency changes its mind at that stage that subsidiary findings supporting the action would be required.

## CONCLUSION

Appellee, Strickland Transportation Co., Inc., respectfully submits that notice of appeal has not been

timely given in this case, and, further, that the questions upon which the decision of this cause depend are so insubstantial as not to require further argument.

WHEREFORE, premises considered, appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the court below.

EWELL H. MUSE, JR.
VAN THOMPSON, JR.
415 Perry Brooks Building
Austin, Texas
*Attorneys for Appellee Strickland Transportation Co., Inc.*

April 13, 1961

## CERTIFICATE OF SERVICE

I, Ewell H. Muse, Jr., Attorney for Appellee, Strickland Transportation Co., Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing Motion To Dismiss Or Affirm on the several parties to this action as follows:

1. On Appellant, Herrin Transportation Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Carl L. Phinney and Mr. Leroy Hallman, Phinney, Hallman and Pulley, 617 First National Bank Building, Dallas, Texas.

2. On Plaintiff, T.S.C. Motor Freight Lines, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Reagan Sayers, Century Life Building, Fort Worth, Texas, and Mr. Jack Binion, Butler, Binion, Rice and Cook, Gulf Building, Houston, Texas.

3. On Intervening Plaintiffs, Central Freight Lines, Inc. and East Texas Motor Freight Lines, Inc., by mailing copies, in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, to-wit: Mr. Phillip Robinson, Robinson and Starnes, 401 Perry Brooks Building, Austin, Texas, and Mr. A. J. Watkins, Baker, Botts, Andrews and Shepherd, 1600 Esperson Building, Houston, Texas.

4. On Defendant United States, by mailing copies in duly addressed envelopes, with air mail postage

prepaid to its attorneys of record, to-wit: Mr. Roger A. Clark, Department of Justice, Washington 25, D. C., Mr. Robert A. Bicks, Acting Assistant Attorney General, Washington 25, D. C., and Mr. William D. Butler, United States Attorney, Southern District of Texas, 218 Main Post Office Building, Houston, Texas.

5. On Defendant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with air mail postage prepaid to its attorneys of record, to-wit: Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

6. On Defendant Southern-Plaza Express, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Clarence D. Todd, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C., Mr. Dwight H. Austin, Liddell, Austin, Dawson and Huggins, Gulf Building, Houston 2, Texas, and Mr. Charles F. Riddle, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

DATED THIS THE 10th day of April, 1961.

EWELL H. MUSE, JR.
VAN THOMPSON, JR.
415 Perry Brooks Building
Austin, Texas
*Attorneys for Appellee Strickland Transportation Co., Inc.*

No. 837

# In the Supreme Court of the United States

OCTOBER TERM, 1960

HERRIN TRANSPORTATION COMPANY, APPELLANT

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION*

## MOTION TO AFFIRM


ARCHIBALD COX,
*Solicitor General,*
LEE LOEVINGER,
*Assistant Attorney General*
RICHARD A. SOLOMON,
*Attorney,*
*Department of Justice, Washington 25, D.C.*

ROBERT W. GINNANE,
*General Counsel,*
JAMES Y. PIPER,
*Assistant General Counsel,*
*Interstate Commerce Commission, Washington 25, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 837

HERRIN TRANSPORTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION*

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from that portion of the decision (J.S. 27; 186 F. Supp. 777) of a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, which sustained orders of the Interstate Commerce Commission (Commission) awarding motor carrier certificates of public convenience and necessity to Strickland Transportation Co., Inc. (Strickland),

and Southern-Plaza Express, Inc. (Southern-Plaza) for certain regular-route general-commodity operations between Houston, Texas, and New Orleans, Louisiana, (J.S. 53–91; 77 M.C.C. 655). Not involved in the appeal is that portion of the judgment of the district court which set aside, and remanded to the Commission for appropriate action, the Commission's authorization for Strickland and Southern-Plaza to perform service at intermediate points on such regular route located between Houston and the Texas-Louisiana state line (J.S. 53–56; 186 F. Supp. at 792–794).

After hearings held on the Strickland and Southern-Plaza applications, at which the appellant Herrin Transportation Company (Herrin) appeared as one of the protestants, the hearing examiner on October 16, 1957, issued a report recommending denial of both applications. Strickland and Southern-Plaza filed exceptions, to which the appellant, among other protestants, replied. The case was sent to Division 1 for action, but as explained below that Division did not act on the applications, and the case went before the full Commission for disposition.

The entire Commission issued its report on October 14, 1958 (J.S. 63–91; 77 M.C.C. 655), differing from the recommendations of the hearing examiner (J.S. 64; 77 M.C.C. 655), and authorizing the issuance to Strickland and Southern-Plaza of certificates, including certain restrictions not here pertinent (J.S. 88–89; 77 M.C.C. at 669–670).

Appellant Herrin, and other protestant motor carriers, filed on January 5, 1959, a petition for reconsideration of the report and order of October 14, 1958.

to which Strickland and Southern-Plaza filed replies. By order of April 10, 1959, the entire Commission denied the petition "for the reason that the findings of the Commission are in accordance with the evidence and the applicable law."

On May 1, 1959, two of the motor carrier protestants, T.S.C. Motor Freight Lines, Inc., and appellant Herrin, filed suit in the court below to review the action of the Commission, attacking not only the merits of the Commission's grants to Strickland and Southern-Plaza, but also attacking certain aspects of the Commission's procedure in handling the proceedings before it. On August 1, 1960, the three-judge district court filed its opinion in the proceeding (J.S. 27–58, 186 F. Supp. 777–795). The court affirmed the Commission in part (including all of the issues raised on this appeal), and in part set aside the Commission order and remanded that part of the case to the Commission for further consistent proceedings (J.S. 58). A formal "judgment" repeating the last two ordering paragraphs of the opinion was subsequently entered on November 28, 1960. Notice of the present appeal was filed on January 20, 1961.

If the Court should otherwise be inclined to note jurisdiction, a question as to the timeliness of this appeal should be noticed. The clerk of the district court noted the filing of the court's opinion in the public docket of the case on August 1, 1960, the same date the opinion was filed. Upon being asked by Commission counsel on September 15, 1960, as to the nature of his journal entry, the clerk replied by letter to all counsel, dated September 20, that "it is the

practice in this District for a final judgment to be entered pursuant to the Court's Opinion, and the time in which appeal may be effected begins the date the judgment is filed with the clerk". The "judgment" of November 28, 1960 (which states that the court "does hereby render judgment as follows" and then merely quotes the final two paragraphs of the August 1, 1960 opinion) was entered in accordance with this directive, but government counsel protected their right to argue that the time for appeal ran from August 1, 1960, by approving the judgment as to form only.

Under these circumstances, there is some question whether the filing and entry of the August 1, 1960, opinion, which in terms finally disposed of the case, did not start the running of the statutory appeal time of sixty days (28 U.S.C. 2101(b)), despite the court's subsequent entry of a formal "judgment" restating the last two paragraphs of the August 1, 1960 decision. See *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227, 232; *United States* v. *Hark*, 320 U.S. 531, 534; *Erstling* v. *Southern Bell Tel. & Tel. Co.*, 255 F. 2d 93, 95 (C.A. 5); *Carnes* v. *United States*, 279 F. 2d 378, 379 (C.A. 10). It seems clear that a separate document labeled "judgment" is not required where a court clearly disposes of all facets of a case in a decision or opinion. *United States* v. *Schaefer Brewing Co., supra; Beacon Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 266 F. 2d 246 (C.A. 7), certiorari denied, 361 U.S. 823. However, both *Schaefer* (356 U.S. at 235) and *Hark* (320 U.S. at 534–535) appear to recognize that, while a district

court cannot extend the period for appeal by entering a second judgment, the subsequent filing of a formal document of record does indicate prima facie that the decisional statement in the earlier opinion, or docket entry thereof, was not intended to be the final action of the court. While in most cases where the later formal judgment has been adopted as controlling, there has been some extrinsic evidence of this intent in the original decision or opinion (or in the court's statements at the time of issuance), it may be that the district court here believed this to be unnecessary in the light of the practice in the district to which the clerk referred in his letter of September 20, 1960.

## ARGUMENT

The procedural points raised by the appellant were all properly rejected below and are so unsubstantial as not to need further argument in this Court.

1. The appellant contends, first, that the Commission's report and order are invalid because (a) the referral of the case by Division 1 to the entire Commission was unauthorized under the Interstate Commerce Act and the Commission's rules, and (b) the action of the Division was not recorded in a formal vote "entered of record." There is plainly no substance in these contentions.

(*a*) Pursuant to Section 17(2) of the Interstate Commerce Act, 49 U.S.C. 17(2), the Commission has published rules assigning most of its functions to four Divisions of three Commissioners, subject (during the time relevant to this case) to the right of parties to file petitions for reconsideration of Division deci-

sions by the entire Commission. The determination of applications under Section 207, such as were involved in the present case, was delegated to Division 1 (23 F.R. 1748). The Commission's rules further provide (23 F.R. 1747; J.S. 103) that:

> Each division with regard to any case or matter assigned to it, or any question brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Commissioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter, or question itself, or may assign or refer the matter to the same or another division.

In this case, following the hearing, the issuance of the hearing examiner's report, and the filing of exceptions, attorneys in the Bureau of Operating Rights prepared for Division 1 and submitted to it a draft of a proposed report and order disposing of the applications. At this point, the clearance clerk for Division 1 directed the following memorandum, dated July 23, 1958, to the director of the Bureau of Operating Rights (J.S. 7):

> MEMORANDUM TO DIRECTOR COYLE
>
> Division 1, COMMRS. MURPHY, WALRATH & GOFF, has today voted to certify the report circulated June 3, 1958 to the entire Commission for consideration and decision; COMMR. WALRATH voting to return the report for revision to grant both applications.

Thereafter, as set forth in the Statement, *supra*, the entire Commission decided the case.

As the court below correctly held (J.S. 33), "The certification of the cases to the Commission by Division 1 complies in all substantial respects with the Commission's organizational rules." The Divisional certification can be construed as a request for the "advice and counsel" of the full Commission or for consideration of the case by "additional Commissioners." Moreover, when the entire Commission accepted the certification and decided the case, its action amounted to a recall of the matter from the Division. That the recall was initiated by the Division, rather than by other members of the Commission, is beside the point, for, as already indicated, the rule expressly contemplates that either the Division or the full Commission may act to enlarge the number of Commissioners deciding any particular case or matter.

(*b*) Section 17(3) of the Interstate Commerce Act provides that "Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested." In compliance with this provision, the Commission's Secretary preserves the text of the motions or statements embodying the Commission's (or a Division's) decision of particular cases, the adoption of substantive or procedural rules, and other matters affecting the rights and interests of private parties, together with the votes of the Commissioners. Such a record is not placed in the public docket of the proceeding but is made public upon the request of a

party. We believe that memoranda embodying the determination of a Division to certify a case to the entire Commission should be regarded as purely internal matters, not affecting the rights of parties, which are not governed by Section 17(3). Since the only "vote" or "official act" of the Commission affecting appellant's rights was with respect to the final determination by the Commission as a whole, and that item was recorded and made public, there was full compliance with Section 17(3). But, in any event, a memorandum was made of the Division 1 action here and the Commission, upon request, furnished appellant with a copy of the memorandum.

Moreover, as the court below stated (J.S. 34), "It is difficult to see how the [appellant] could have been prejudiced by the failure to record the action of Division 1 since it resulted in a consideration by the entire Commission." Clearly, appellant had no right under the Act to have its case decided by the Division rather than by the entire Commission. Nor was it deprived of a right to object to the overruling of the examiner's proposed report since it both had and availed itself of an opportunity to seek reconsideration of the report by the full Commission (J.S. 35). Under these circumstances, the court below was plainly correct in holding that appellant was not injured or prejudiced by the Commission's action (*ibid.*). See Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)); *Sullivan* v. *United States*, 348 U.S. 170, 173; *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 406 (S.D.N.Y.).

2. Appellant also contends erroneously that the Commission's report and order of October 14, 1958, are invalid because they were adopted by the Commission through a system of notation voting, rather than at a conference with the Commissioners physically present.

Such voting by notation at constructive sessions of the Commission is now defined and governed by a minute adopted by the Commission in 1953. Briefly,[1] it provides that the proposed report or other document under consideration will be circulated among the Commission members who may either record their votes on the document or in separate memoranda. Any Commissioner desiring to explain his vote may do so and his explanation must be distributed to the other members. Commissioners may consult each other informally in the process of voting and any single Commissioner has the right to require that the matter be considered at a face-to-face conference of the full Commission.

The appellant contends that such notation voting violates the provision of Section 17(3) of the Interstate Commerce Act that "A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business." But this portion of Section 17(3) does not purport to require that Commission action be taken only in a formal meeting. Rather, the first sentence of Section 17(3) specifically authorizes the Commission to "conduct its proceedings under any provision of law in such manner as

[1] The full minute entry (with irrelevant deletions) is set out in the opinion of the district court (J.S. 35, n. 18).

will best conduce to the proper dispatch of business and to the ends of justice." This latter language has been construed by this Court as conferring upon the Commission "broad discretion" as to procedural matters—including matters relating to the process of decision (*Federal Communications Commission* v. *WJR*, 337 U.S. 265, 278, 282–283)—and as a "broad enabling statute" (*American Trucking Assns.* v. *Frisco Transportation Co.*, 358 U.S. 133, 145). We submit that the court below correctly found that "in view of the broad grant to the Commission of authority to control its proceedings, it may select this type of voting procedure as an aid in dealing with its tremendous workload" (J.S. 37).

While the bulk of state court decisions cited by appellant seem to deny that agency or municipal action can be valid except where taken in the course of a formal corporate meeting, many of these state decisions rest upon an assumed lack of notice to the members of a tribunal, an element which is not present in the Commission's notation voting procedure.[2] In any

[2] For a recent view of the highest court of a State upon notation voting, see *Erkman* v. *Civil Service Commission*, 114 Utah 228, 236, 198 P. 2d 238, 242–243, in which the Supreme Court of Utah made the following statement:

"Nor is it material that the defendant commission did not meet in formal session to adopt the findings of fact. To require such a formality would bind the commission to considerably greater formal exactitude than binds the highest, and assumedly the most formal tribunal of this state. The members of this court do not meet in formal session to approve proposed opinions. There is no apparent reason to impose upon the commission the burden of acting on a more formal manner. It is sufficient if a majority of the commission signs the findings."

event, so far as we have been able to determine, the federal courts have never held that a federal tribunal, judicial or administrative, cannot take valid action through written or notation voting procedures which preserve to each member of the tribunal the right to invoke an oral and collective conference on the matter. Where, as in the case of the Interstate Commerce Commission, huge case loads are involved, the agency must, in the absence of specific statutory provision to the contrary, be accorded large discretion as to the manner in which it musters its collective judgment.

As the court below noted (J.S. 36, n. 19), the Congress and the bar have been notified repeatedly of the notation voting procedures of the Commission. Thus, those procedures were described in the 1941 monograph on the Interstate Commerce Commission which was issued by the Attorney General's Committee on Administrative Procedure (Part 11, p. 36, of Senate Doc. No. 10, 77th Cong., 1st Sess.). They were described again in the 1944 *Report on Practices and Procedures of Governmental Control* (House Doc. No. 678, 78th Cong., 2d Sess., p. 194) transmitted to the House of Representatives by the Board of Investigation and Research created by Section 301 of Title III, Part I, of the Transportation Act of 1940, 54 Stat. 952. And, in 1951, the Commission's notation voting procedures were again described in Davis, *Administrative Law*, p. 352. Congressional concern with the case load problems of the Commission is reflected in the unique delegation provisions of Section 17 of the Interstate Commerce Act (49 U.S.C. 17). It is also reflected in the fact that, with 20

years' knowledge of the Commission's notation voting procedures, Congress has not made any effort to supersede those procedures.

Appellant attacks the legality of notation voting upon the further ground that the Commission failed to publish a description of it in the Federal Register, as allegedly required by Section 3(a) of the Administrative Procedure Act (5 U.S.C. 1002(a)) (J.S. 16). But Section 3(a) expressly excepts from its requirements "any matter relating solely to the internal management of an agency," and further provides that "No person shall in any maner be required to resort to organization or procedure not so published." Since notation voting is not a procedure which parties to Commission proceedings must "resort to" in presenting their case to the Commission, the court below correctly held (J.S. 38–39) that it is not designed for the guidance of the public, is "solely a matter of internal procedure within the Commission," and is therefore not invalid because it was not published in the Federal Register.

3. Equally without substance is the contention that the Commission's report and order are invalid because the Commission was assisted in the process of final decision by staff attorneys—not appointed as hearing examiners pursuant to Section 11 of the Administrative Procedure Act—who prepared a draft of a final report which was not served upon the parties with an opportunity to file exceptions (within the meaning of Section 8(b) of the Administrative Procedure Act) (J.S. 16–20).

In this case (as in others) the Commission was assisted in its final decisional process by staff attorneys who drafted and reviewed a proposed final report which was submitted to the Commission for its consideration. In most cases, as in this one, these attorneys are not hearing examiners appointed under Section 11. The draft reports are not served upon the parties or otherwise made public. In such circumstances, the law is settled that agency heads may utilize staff assistance of this kind. *Morgan* v. *United States,* 298 U.S. 468, 481; *United States* v. *Morgan,* 313 U.S. 409, 422; *Norris & Hirshberg* v. *Securities and Exchange Commission,* 163 F. 2d 689 (C.A.D.C.), certiorari denied, 333 U.S. 867. The practice is not barred by the Administrative Procedure Act, since Section 5(c) of that Act excludes from participation in the decisional process only those agency employees who have engaged in investigative or prosecuting functions. Where Congress has wished to specify any particular method by which an agency can utilize staff personnel not involved in investigative or prosecutory activities, it has done so specifically. Thus, in statutes enacted subsequent to the Administrative Procedure Act, Congress has required a separate opinion and review staff to assist the Federal Communications Commission in hearing cases,[3] but has provided that personal assistants must be assigned to individual members of the National Labor Relations Board to perform these tasks.[4] In no case has Congress prohibited agency heads from obtaining such

[3] 66 Stat. 713, 47 U.S.C. 155(c).
[4] 61 Stat. 139, 29 U.S.C. 154(a).

staff assistance or required that it be obtained only from hearing examiners.

Section 8(b) of the Administrative Procedure Act provides that parties shall have an opportunity to submit "exceptions to the decisions or recommended decisions of subordinate officers." The contention that this applies to a draft of a final report prepared for the Commission by staff assistants is wholly without merit. The court below correctly held (J.S. 44–45) that the reference to "recommended decisions of subordinate officers" clearly refers to the recommended decisions of hearing examiners or of the "responsible officers" who, under the last sentence of Section 8(a), may make recommended decisions in certain classes of cases. It does not apply to assistance through legal assistants, law clerks, or staff attorneys. Any other construction would plainly destroy the usefulness of staff assistance to agency heads in the process of making decisions.[5]

[5] In its "Questions Presented," appellant also suggests that the Commission's order of April 10, 1959, denying a petition for reconsideration, was invalid because not accompanied by the detailed findings contemplated by Section 8(b) of the Administrative Procedure Act (J.S. 5). The point is not discussed by appellant, and it is without merit for the reasons stated by the court below (J.S. 39–40).

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
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LEE LOEVINGER,
*Assistant Attorney General.*

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*Interstate Commerce Commission.*

APRIL 1961.

MAY
JAMES R. BROWNING, Clerk

No. 837

In the

# Supreme Court of the United States

OCTOBER TERM 1960

HERRIN TRANSPORTATION COMPANY,
*Appellant,*

*v.*

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
SOUTHERN-PLAZA EXPRESS, INC.,
*and*
STRICKLAND TRANSPORTATION CO., INC.,
*Appellees.*

*On Appeal from the United States District Court for the Southern District of Texas*

## BRIEF OPPOSING MOTIONS TO AFFIRM AND OR DISMISS

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Dated: May 1, 1961

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*On Appeal from the United States District Court for the Southern District of Texas*

## BRIEF OPPOSING MOTIONS TO AFFIRM AND/OR DISMISS

Pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court, appellant files this brief in opposition to the Motion to Affirm filed by appellees United States of America and Interstate Commerce Commission and the Motion to Affirm or Dismiss filed by appellee Strickland Transportation Co.

## STATEMENT

Appellant's Jurisdictional Statement heretofore filed herein presents the issues involved, and no reply to the motions of appellees as to the questions presented is deemed necessary.

Appellee Strickland does, however, move to dismiss the appeal as not timely filed and, while appellees United States of America and Interstate Commerce Commission make no point in this connection, mention is made of the dates of the filing of the opinion of the Court below, the entry of the judgment, and the filing of notice of appeal.

The opinion of the Court below was filed August 1, 1960, the cause having been heard on September 22, 1959. On September 20, 1960, the Clerk by letter addressed to the Commission Counsel, copy to all counsel, advised that "it is the practice in this District for a final judgment to be entered pursuant to the Court's opinion, and the time in which appeal may be effected begins the date the judgment is filed with the Clerk."

Final judgment, after approval as to form by all counsel, was filed November 28, 1960 (Appendix B to appellant's Jurisdictional Statement) and Notice of Appeal was filed January 20 ,1961.

## ARGUMENT

The appeal was, it is clear, timely taken.

In *Supreme Court Practice, Second Edition, Revised Rules* (1954), (Robert L. Stern and Eugene Gressman), at p. 288, the applicable rule is stated as follows:

> "Whether the judgment or order below from which the time is computed is a docket entry by the clerk or a

formal order signed by the judge varies with the local practice. *United States v. Hark*, 320 U. S. 531, 534 * * *; see also *Puget Sound P. L. Co. v. King County*, 264 U. S. 22, 23-24 (date of judgment, not opinion, decisive)."

Indeed, the Motion to Affirm filed by counsel for United States and the Commission recognizes the rule as just stated. As this Court stated in *United States v. Shaffer Brewing Co., 356 U. S. 227, at 235*,

> " 'Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry * * *. The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.' *United States v. Hark*, 320 U. S. at 534, 535."

The foregoing statement of this Court is controlling here, we submit, and permits of no conclusion but that this appeal was timely taken, in accordance with practice prevailing in the Court below.

The identical situation was present in *Interstate Commerce Commission, Appellant v. Frozen Food Express, et al., Appellee, 355 U. S. 6*, where the opinion of the Three Judge Court in the same Southern District of Texas, Houston Division, from which this appeal is taken, was filed December 31, 1956, final judgment was entered March 14, 1957,

and notice of appeal was filed by the Interstate Commerce Commission May 13, 1957. There the Commission relied upon the local practice of the Southern District of Texas, Houston Division, and the cases relied upon by appellant here, else its appeal would not have been timely.

We submit that the appeal here was timely taken, in accordance with the local practice and applicable decisions of this Court.

## CONCLUSION

For the reasons stated, we believe that the appeal was timely taken, and the Motion to Dismiss on that ground should be overruled, and, for the reasons stated in appellant's Jurisdictional Statement, that the Motions to Affirm should be denied.

Respectfully submitted,

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By _____
CARL L. PHINNEY
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## CERTIFICATE OF SERVICE

I, Carl L. Phinney, Attorney, for the Appellant Herrin Transportation Company herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing Statement of Jurisdiction on the several parties to this action, as follows:

1. On plaintiff, T.S.C. Motor Freight Lines, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Reagan Sayers, Century Life Building, Fort Worth, Texas, and Mr. Jack Binion, Butler, Binion, Rice and Cook, Gulf Building, Houston, Texas.

2. On Intervening Plaintiffs, Central Freight Lines, Inc. and East Texas Motor Freight Lines, Inc., by mailing copies, in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, to-wit: Mr. Phillip Robinson, Smith, Robinson and Starnes, 401 Perry Brooks Building, Austin, Texas, and Mr. A. J. Watkins, Baker, Botts, Andrews and Shepherd, 1600 Esperson Building, Houston, Texas.

3. On defendant United States, by mailing copies in duly addressed envelopes, with air mail postage prepaid to its attorneys of record, to-wit: Mr. Roger A. Clark, Department of Justice, Washington 25, D. C.; Mr. Robert A. Bicks, Acting Assistant Attorney General, Washington 25, D. C., and Mr. William D. Butler, United States Attorney, Southern District of Texas, 218 Main Post Office Building, Houston, Texas.

4. On defendant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with air mail

postage prepaid to its attorneys of record, to-wit: Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

5. On defendant Strickland Transportation Company by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorney of record, to-wit: Mr. Ewell H. Muse, Jr., 415 Perry Brooks Building, Austin, Texas, and W. N. Arnold, Jr., Fullbright, Crooker, Freeman, Bates and Jaworski, Bank of the Southwest Building, Houston 2, Texas.

6. On defendant Southern-Plaza Express, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Clarence D. Todd, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.; Mr Dwight H. Austin, Liddell, Austin, Dawson and Huggins, Gulf Building, Houston 2, Texas, and Mr. Charles F. Riddle, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

DATED THIS THE 1st day of May, 1961

CARL L. PHINNEY,
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